APPENDIX A

SUPREME COURT OF TEXAS

No. 05-0541

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Petitioners,

v.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF TEXAS,
Respondents.

ARGUED APRIL 11, 2007.
DECIDED MAY 16, 2008.
REHEARING DENIED AUG. 29, 2008.

Justice WILLETT delivered the opinion of the Court, in which Chief Justice JEFFERSON, Justice O'NEILL, Justice GREEN, and Justice JOHNSON joined.

For over a century, Texas has taxed the premiums collected on title insurance policies sold here.[1] For almost as long, Texas has imposed an additional "retaliatory" tax when necessary to equalize the tax burdens borne by

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[1] *See, e.g.*, Act approved May 13, 1905, 29th Leg., 1st C.S., ch. 6, § 1, 1905 Tex. Gen. Laws 427, 427-28 (amending an earlier statute by specifically including title insurance companies in the premium tax scheme).

Texas and foreign-based title insurance companies.[2] This system has operated with minimal change until a few years ago when the Comptroller reinterpreted the retaliatory tax statute in a way that sharply increased the tax liability of certain non-Texas title insurers.

Two of those foreign insurers challenge the Comptroller's revised interpretation,[3] arguing that it contravenes the plain meaning of the controlling statutes and violates the insurers' equal protection rights under the United States and Texas Constitutions. We disagree and, accordingly, affirm the court of appeals' judgment.

I. Background

First American Title Insurance Company (First American) and Old Republic National Title Insurance Company (Old Republic) are out-of-state title insurance companies doing business in Texas. First American is California-based and issues Texas policies directly and also through independent agents; Old Republic is Minnesota-based and issues policies in Texas only through independent agents. Title agents are distinct business entities, usually corporations or limited liability companies, that engage in title insurance work independent of title insurance companies.

The Texas Department of Insurance (TDI) prescribes the premium that insurers may charge policyholders for title insurance.[4] When a title insurer issues policies

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[2] *See* Act of May 2, 1935, 44th Leg., R.S., ch. 307, § 1, 1935 Tex. Gen. Laws 713, 713-14, *repealed by* Act of May 23, 1951, 52nd Leg., R.S., ch. 491, § 4, 1951 Tex. Gen. Laws 868, 1093.

[3] The original Respondent to this appeal was the predecessor to the present Comptroller. As the former Comptroller left office before this appeal was disposed of, "the public officer's successor is automatically substituted." TEX. R. APP. P. 7.2(a).

[4] Act of June 7, 1951, 52nd Leg., R.S., ch. 491, § 1, art. 9.03, 1951 Tex. Gen. Laws 868, 970-71, *amended by* Act of June 7, 1955, 54th

through an independent agent, TDI also prescribes how the insurance company and the agent should divide the premium.[5] During the period relevant to this case, TDI allowed agents to keep 85% of premiums collected from policyholders and remit the remaining 15% to the insurer.[6] Texas insurance law subjects the full amount of the premium to a premium tax;[7] for logistical simplicity,

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Leg., R.S., ch. 489, § 3, 1955 Tex. Gen. Laws 1223, 1224-25, *amended by* Act of May 4, 1967, 60th Leg., R.S., ch. 219, § 1, art. 9.07, 1967 Tex. Gen. Laws 490, 493-94, *amended by* Act of May 31, 1975, 64th Leg., R.S., ch. 409, § 4, 1975 Tex. Gen. Laws 1063, 1065-67, *amended by* Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 6, 1987 Tex. Gen. Laws 3610, 3627-28, *amended by* Act of May 30, 1993, 73rd Leg., R.S., ch. 685, § 16.02, art. 9.07, 1993 Tex. Gen. Laws 2559, 2677-78, *amended by* Act of May 7, 1995, 74th Leg., R.S., ch. 127, § 6, 1995 Tex. Gen. Laws 949, 949-51, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (current version at TEX. INS. CODE § 2703.151(a)). Although the relevant statutes have since been recodified, we will refer to them as they were written from 2001 to 2002, the tax years in controversy here.

[5] Act of May 4, 1967, 60th Leg., R.S., ch. 219, § 1, art. 9.30, 1967 Tex. Gen. Laws 490, 504, *amended by* Act of May 31, 1975, 64th Leg., R.S., ch. 409, § 12, 1975 Tex. Gen. Laws 1063, 1069-70, *amended by* Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 8, art. 9.30, 1987 Tex. Gen. Laws 3610, 3630-31, *amended by* Act of May 7, 1995, 74th Leg., R.S., ch. 127, § 11, 1995 Tex. Gen. Laws 949, 952, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (current version at TEX. INS. CODE § 2502.054(b)(1)).

[6] 28 TEX. ADMIN. CODE § 9.1 (adopting Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in Texas, which is available at http://www.tdi.state.tx.us/title/titlem4d.html#P-23 and specifies a 15/85 split of the premium between insurer and agent).

[7] Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 22, art. 9.59, 1987 Tex. Gen. Laws 3610, 3638-39, *amended by* Act of May 30, 1993, 73rd Leg., R.S., ch. 685, § 3.19, 1993 Tex. Gen. Laws 2559, 2591, *amended by* Act of May 22, 1997, 75th Leg., R.S., ch. 1423, § 11.35, 1997 Tex. Gen. Laws 5329, 5390, *amended by* Act of May 20, 1999, 76th Leg.,

the title insurers remit the full amount of tax on these premiums to the State.[8] All title insurance companies operating within the State, Texas-based or not, are subject to the premium tax.[9]

Besides this premium tax, Texas also imposes a retaliatory tax on foreign title insurers like First American and Old Republic if their home states impose more burdensome taxes, fees, and other obligations on Texas title insurers selling insurance there than Texas imposes on foreign title insurers selling insurance here.[10] The "principal purpose" behind retaliatory taxes, as the United States Supreme Court explained when it upheld their constitutionality, "is to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes" against foreign

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R.S., ch. 852, § 3, 1999 Tex. Gen. Laws 3520, 3521, *amended by* Act of May 26, 2001, 77th Leg., R.S., ch. 763, § 4, 2001 Tex. Gen. Laws 1501, 1502-03, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (current version at TEX. INS. CODE §§ 223.001-.011) [hereinafter Former TEX. INS. CODE art. 9.59].

[8] Former TEX. INS. CODE art. 9.59, § 8(b).

[9] § 1.

[10] Act of May 22, 1957, 55th Leg., R.S., ch. 396, § 1, 1957 Tex. Gen. Laws 1184, 1184-85, *amended by* Act of May 30, 1983, 68th Leg., R.S., ch. 622, § 16, 1983 Tex. Gen. Laws 3891, 3929-31, *amended by* Act of July 3, 1984, 68th Leg., 2nd C.S., ch. 31, Art. 4, § 5, 1984 Tex. Gen. Laws 193, 221, *amended by* Act of May 28, 1989, 71st Leg., R.S., ch. 237, § 3, 1989 Tex. Gen. Laws 1102, 1106, *amended by* Act of May 22, 1989, 71st Leg, R.S., ch. 242, § 6, 1989 Tex. Gen. Laws 1151, 1154, *amended by* Act of May 18, 1995, 74th Leg., R.S., ch. 279, § 9, 1995 Tex. Gen. Laws 2619, 2622, *amended by* Act of May 20, 1999, 76th Leg., R.S., ch. 852, § 4, 1999 Tex. Gen. Laws 3520, 3521-22, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138 (current version at TEX. INS. CODE §§ 281.001-.007) [hereinafter Former TEX. INS. CODE art. 21.46].

insurance companies.[11] Retaliatory taxes are ubiquitous, having "been a common feature of insurance taxation for over a century,"[12] and they exist in every state except Hawaii.[13]

First American and Old Republic remitted premium and retaliatory taxes to the Comptroller, calculating the retaliatory tax owed based on the full amount of premium taxes they remitted to the State. Thus, they included not only the premium tax paid on the 15% of the premium they earned but also the premium tax paid on the 85% of the premium earned by independent agents. However, in 1996 the Comptroller adopted a new rule that recognized the agent's responsibility for "taxes due on the agent's portion of the premium."[14] This change resulted in a new method of calculating the retaliatory tax. The Comptroller reasoned that because title insurers keep only 15% of premiums collected on agent-issued policies and pay only 15% of the premium tax—despite remitting the entire 100% to the State—foreign title insurers could count only that 15% when figuring the amount of retaliatory tax owed. The result of this new math: the foreign insurers' premium tax liability dropped compared with what other states imposed on Texas insurers, thus substantially increasing the foreign insurers' retaliatory tax liability.

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[11] *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

[12] *Id.*

[13] *See* HAW. REV. STAT. § 431:7-206 (granting domestic insurance companies a tax credit for the amount of retaliatory tax paid to other states); *Prudential Ins. Co. of Am. v. Comm'r of Revenue*, 429 Mass. 560, 709 N.E.2d 1096, 1098, 1100 n.7 (1999).

[14] 21 Tex. Reg. 838 (1996), *adopted* 21 Tex. Reg. 3948 (1996) (codified at 34 TEX. ADMIN. CODE § 3.831(3)(B)) (current version at 34 TEX. ADMIN. CODE § 3.831(4)(B)).

The Comptroller's interpretive change required First American to pay an extra $1,432,580.76 in retaliatory taxes and interest for tax years 2001 and 2002, which First American paid under protest. Old Republic paid a total of $219,626.40 in retaliatory taxes for tax year 2002 based on the new method, also under protest. The insurers then filed separate lawsuits in district court to recover the excess tax payments incurred as a result of the Comptroller's new interpretation of the retaliatory tax statute. In each case, the insurer and the Comptroller filed cross-motions for summary judgment; in each case, the trial judge awarded summary judgment to the Comptroller without elaboration. Both insurers appealed; their appeals were consolidated; and the court of appeals affirmed, holding that the Comptroller's revised interpretation of the statutes was reasonable and constitutional.[15]

II. Standard of Review

The insurers argue the Comptroller's interpretive change offends the plain meaning of the relevant Insurance Code provisions and also violates the equal protection clauses of the United States and Texas Constitutions. Since "cases should be decided on narrow, nonconstitutional grounds whenever possible,"[16] we begin with the statutory claim, examining the statutes as they existed in tax years 2001-02, the time of this dispute.

The construction of a statute is a question of law we review de novo.[17] When interpreting a statute, we look first and foremost to the plain meaning of the words used.[18] "If the statute is clear and unambiguous, we must

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[15] 169 S.W.3d 298, 302-03, 313.

[16] *VanDevender v. Woods*, 222 S.W.3d 430, 433 (Tex. 2007).

[17] *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

[18] *Id.*

apply its words according to their common meaning"[19] in a way that gives effect to every word, clause, and sentence.[20] And ordinarily, when divining legislative intent, "the truest manifestation" of what lawmakers intended is what they enacted, "the literal text they voted on."[21]

The insurers argue that, because the retaliatory tax provision is "penal" in nature, we should strictly interpret its language and resolve any ambiguities against the Comptroller. The Supreme Court has cast doubt on whether retaliatory taxes are penal in nature: "the principal purpose of retaliatory tax laws is to promote the interstate business of domestic insurers . . . 'their ultimate object is not to punish foreign corporations doing business in the state.'"[22] Furthermore, although we have applied "a stricter construction" to tax statutes in the past, we have done so only when "doubt about [the statute's] application still remains after dominant rules of construction have been applied."[23] One of those "dominant rules of construction" requires us to give "serious consideration" to the "[c]onstruction of a statute by the administrative agency charged with its enforcement."[24] The retaliatory tax statute states that "the comptroller

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[19] *Id.*

[20] *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006) (*quoting City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003)).

[21] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006).

[22] *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981) (quoting P.H. Vartanian, Annotation, *Constitutionality, Construction, Operation, and Effect of Retaliatory Statutes Against Foreign Corporations Doing Business Within State*, 91 A.L.R. ANN. 795 (1934)).

[23] *Calvert v. Tex. Pipe Line Co.*, 517 S.W.2d 777, 781 (Tex. 1974).

[24] *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

shall impose" the retaliatory tax.[25] The premium tax statute provides that "the commissioner or comptroller, as appropriate, may adopt rules, regulations, minimum standards, and limitations that are fair and reasonable as may be appropriate for the augmentation and implementation of this article."[26] Because the Legislature charged the Comptroller with enforcement of these statutes, we will uphold her interpretation "so long as the construction is reasonable and does not contradict the plain language of the statute."[27]

III. Discussion

First American and Old Republic contend that the Comptroller's interpretation of the retaliatory tax scheme improperly excludes a portion of the premium tax that they are obligated to pay under the premium tax provision, ultimately resulting in artificially high retaliatory taxes. Article 21.46 of the Insurance Code—the retaliatory tax provision operative at the time this dispute arose—requires the Comptroller to impose a retaliatory tax on an out-of-state insurance company when the financial burden imposed on Texas insurers by a foreign state exceeds the aggregate of taxes and other obligations "directly imposed" on foreign insurers by Texas.[28] The parties agree that the principal obligation "directly imposed" on title insurers in Texas is the premium tax.

A. The Premium Tax Provision

Article 9.59 of the Insurance Code requires that "[e]ach title insurance company receiving premiums from the business of title insurance shall pay to the comp-

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[25] Former TEX. INS. CODE art. 21.46, § 1(a).

[26] Former TEX. INS. CODE art. 9.59, § 3(c).

[27] *Tarrant Appraisal Dist.*, 845 S.W.2d at 823.

[28] Former TEX. INS. CODE art. 21.46, § 1(a).

troller a tax on those premiums as provided in this article."[29] This tax applies to "all amounts defined to be premium in this Chapter, whether paid to the title insurance company or retained by the title insurance agent."[30] The Chapter defines a premium as "the total amount of premiums received for the taxable year on title insurance written on property located in this state."[31] Title insurers doing business in Texas are required to file an annual tax return and remit the total amount of tax due directly to the Comptroller.[32] Title insurance agents do not file returns or pay premium taxes directly:

> The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.[33]

The parties agree that Article 9.59 taxes all premiums earned from the provision of title insurance, whether earned by an insurance company or an insurance agent, but the parties disagree on whom the tax is imposed. The insurers argue that they are the only parties obligated by Article 9.59 to pay the premium tax, so the full amount of their payment should be included in the retaliatory tax calculation. The Comptroller responds that although the insurance company remits the entire premium tax, the insurer merely acts as a conduit for 85% of the premium tax, which is actually paid by the insurance agent. According to the Comptroller, because the insur-

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[29] Former TEX. INS. CODE art. 9.59, § 1.

[30] § 8(b).

[31] § 2.

[32] §§ 5, 8(b).

[33] § 8(b).

ance company remits 85% of the premium tax to the State as an administrative mechanism and in economic reality bears only 15% of the tax burden, the insurer can only include 15% of the tax in its calculation of taxes "directly imposed." Thus, the dispute hinges on whether the full premium tax is "directly imposed" on title insurance companies under the retaliatory tax provision.

The Comptroller's application of the premium tax to insurance agents is reasonable and in harmony with the statute's plain meaning. As the insurers point out, Article 9.59 requires the insurance company, not the insurance agent, to report[34] and pay[35] the premium tax on all premiums earned from the provision of title insurance.[36] But the statute also recognizes that agents receive premiums, and it explicitly taxes those premiums: "The premium tax is levied on *all* amounts defined to be premium in this Chapter, whether paid to the title insurance company or retained by the title insurance agent."[37]

Nevertheless, the insurers contend that the premium tax, while applied to all premiums earned, is not imposed on the agent because "[t]he premium tax is levied on all amounts defined to be premium . . . such tax being in lieu of the tax on the premium retained by the agent."[38] Taken in isolation, this phrase arguably exempts insurance agents from paying the premium tax. But the full context of Subsection 8(b) yields a different understanding. The very next sentence provides that the State "facilitates the collection of the premium tax on the premium retained by the agent" by dividing the premium

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[34] § 5.

[35] § 1.

[36] § 2.

[37] § 8(b) (emphasis added).

[38] *Id.*

between insurer and agent "so that the insurer receives the premium tax due on the agent's portion of the premium."[39] The State would have no need to ensure that insurance companies receive the agent's portion of the premium tax if the tax were not imposed on the agents. Rather, "in lieu of" creating a separate tax collection system for insurance agents, the Legislature implemented an integrated system of taxation with the insurance company acting as the central collection point.[40] The premium tax applies to the premium earned by the agent, and Article 9.59 requires the agent to bear the burden for the agent's portion of the taxes: "the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State."[41]

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[39] *Id.*

[40] This taxation system set up by the Legislature, whereby one party serves as a collection or transfer agent of a tax that is actually imposed on and paid by another, is not novel. Federal and state tax schemes abound with similar collection systems; for example, federal personal income taxes are imposed on individual employees, even though employers remit the bulk of these taxes to the government through the withholding mechanism and face liability for their failure to do so. *See* I.R.C. § 6672(a) (2006); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 467, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995) (acknowledging the settled proposition that employees, not employers, bear the burden of income tax); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 97 n.6 (3d Cir. 1994) ("[T]he theory of trust fund taxes (like income tax withholding) is that the tax is imposed on one party (for example, an employee), but is collected and held by another party (for example, the employer)." (quoting *In re Markos Gurnee P'ship*, 163 B.R. 124, 129 & n.4 (Bkrtcy. N.D. Ill. 1993) (internal quotation marks omitted))).

[41] Former TEX. INS. CODE art. 9.59, § 8(b). The insurers argue that, in spite of the plain language of Subsection 8(b), insurance agents do not remit their portion of the premium tax to insurance companies. To support their contention, the insurers point to forms used by TDI in setting the premium division. The title insurer form lists 100% of the premium tax as an expense; the title agent form does not list

Article 9.59 describes the insurer's role as a pass-through entity relied on by the State to "facilitate[ ] the collection of the premium tax"[42] from the insurance agent. At most, the only compulsion or obligation required of the insurer with regard to 85% of the premium tax is to write a check drawn on money remitted by the agent—at the end of the day, the insurer's bank account is not negatively impacted. This administrative burden of acting as a conduit for the agents' tax payments does not rise to the level of a "direct imposition" and therefore cannot be counted as a burden meriting inclusion in the retaliatory tax calculation.

B. Penalties for Noncompliance with the Premium Tax Statute

However, the insurers point out that Article 9.59 requires more of title insurance companies than writing a check; the statute further states that "[a] title insurance company failing to pay all taxes imposed by this article is also subject to Article 4.05 of this code."[43] Article 4.05 requires insurance companies to pay their taxes prior to receiving a certificate of authority to do business in the state; the statute also authorizes the Comptroller to institute a collection action against insurers that underreport gross premium receipts.[44] Thus, the insurers argue that

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premium tax at all. This argument does not persuade us. The title agent form does contain an expense line for the amount of premiums remitted to the title insurer, and the statutory language makes clear that the agent's portion of the premium tax is to be included in that remittance. Furthermore, TDI cannot override the plain language of the premium tax statute.

[42] *Id.*

[43] § 9.

[44] Act of June 7, 1951, 52nd Leg., R.S., ch. 491, § 1, art. 4.05, 1951 Tex. Gen. Laws 868, 923, *amended by* Act of May 30, 1993, 73rd Leg., R.S., ch. 685, Art. 3, § 3.10, art. 4.05, 1993 Tex. Gen. Laws 2559, 2581, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1),

even if insurance agents are taxed on their portion of premiums, insurers alone run the risk of Article 4.05 sanctions for failing to pay the full amount of the premium tax.

The Comptroller alleviated this risk by implementing new policies along with her new interpretation of the tax statutes. These policies allocate responsibility for nonpayment of premium taxes according to the respective tax burdens borne by insurance agents and insurance companies. In 2000, the Comptroller published a new policy making agents directly liable to the Comptroller if they fail to remit their portion of the premium tax to insurers. This understanding was further solidified in 2001, when the Comptroller added the following provision to Insurance Tax Rule 3.831:

> Title insurers and title agents are both subject to the premium and maintenance tax on their proportional share of the premiums and are separately liable for the tax if the insurer fails to remit the tax due on the agent's portion.[45]

Under this new rule, title insurers cannot be held liable for nonpayment of the agent's portion of the premium tax—insurers will face statutory consequences only if they fail to remit their own portion of the premium tax.

The insurers argue that Rule 3.831 contradicts Section 1 of Article 9.59, which requires insurance companies to pay the premium tax, and Section 2 of Article 9.59, which clarifies that the premium tax applies to all premiums earned. Contrary to the insurers' claims, Rule 3.831 does not alter the payment mechanism set up by Article 9.59; under the plain terms of the Rule, separate liability

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2003 Tex. Gen. Laws 3611, 4138 (current version at TEX. INS. CODE § 203.002).

[45] 34 TEX. ADMIN. CODE § 3.831(4)(C).

applies "if the insurer fails to remit the tax due on the agent's portion."[46] Thus, Rule 3.831 comports with Article 9.59—the insurer remits the premium tax for both the insurer and the agent—while clarifying that each party will be held liable only for the portion of premium tax that it owes.

C. The Retaliatory Tax Provision

Nevertheless, the insurers contend that even if the full amount of the premium tax is not "directly imposed" on them, the Comptroller's interpretation must still fail because it conflicts with various portions of the retaliatory tax provision.

The retaliatory tax provision operative at the time this dispute arose, Article 21.46 of the Insurance Code, allows the Comptroller to impose a retaliatory tax on an out-of-state insurer

> [w]henever by the laws of any other state or territory of the United States any taxes, . . . licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company that is organized in this State and licensed and is doing business or that may do business in such other state or territory which, in the aggregate are in excess of the aggregate of the taxes, . . . licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions *directly imposed* upon a similar insurance company of such other state or territory doing business in this State. . . .[47]

The insurers argue that the retaliatory tax provision does not just require insurance companies to compare the taxes imposed by Texas and their home states, the pro-

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[46] *Id.*

[47] Former TEX. INS. CODE art. 21.46, § 1(a) (emphasis added).

vision also requires them to compare "other obligations . . . directly imposed" by this State.[48] According to the insurers, the Comptroller does not give them credit for all of the burdens they bear; namely, the Comptroller excludes from consideration the obligation to report[49] and remit[50] the full amount of the premium tax to the State.

The last clause of Subsection (a) provides a clearer context for the meaning of "other obligations": "the aggregate of taxes, licenses, fees, fines, penalties or other obligations imposed by this State pursuant to this Article . . . shall not exceed the aggregate of *such charges* imposed by such other state."[51] Here, the Legislature replaced the laundry list of taxes, fees, and other obligations with the words "such charges," indicating that the "other obligations" meant to be included in the retaliatory tax calculations are financial charges "directly imposed" on title insurers. Thus, the administrative responsibilities of filling out forms and remitting the full premium tax do not qualify as "other obligations" under Article 21.46.[52]

D. A Response to the Dissent

The insurers' arguments center on one underlying theme: the Comptroller's interpretation improperly cred-

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[48] *Id.*

[49] Former TEX. INS. CODE art. 9.59 § 5.

[50] §§ 1, 8(b).

[51] Former TEX. INS. CODE art. 21.46, § 1(a) (emphasis added)

[52] The insurers also argue that the Comptroller's new interpretation of the retaliatory tax scheme violates the express mandate of Article 21.46 because the total taxes on premiums earned by foreign title insurers operating in Texas exceeds the total taxes on premiums earned by Texas title insurers operating elsewhere. This argument depends upon an interpretation of Article 9.59 that credits the insurers 100% of the premium tax payment. Having rejected that interpretation of Article 9.59, we also reject this argument.

its foreign title insurers with a lower premium tax payment (15%) than what they actually pay (100%), which results in an improperly high retaliatory tax burden. The dissent frames the issue differently: the Comptroller's interpretation "compare[s] other states' taxes on total premiums with Texas' tax on only the insurer's 15% share," resulting in an unfair comparison "as equal as 15 is to 100."[53] The dissent's argument is premised on an understanding that the retaliatory tax scheme was originally based on a comparison of "the taxes on total premiums" imposed by Texas and other states, and that the retaliatory tax is only fair if it takes into consideration the burdens placed "on the insurance industry"—both the insurer and associated agents.[54] Comparing the tax burden imposed on the entire title insurance industry in Texas and a hypothetical other state, the dissent concludes that the Comptroller has artificially lowered the effective premium tax rate in a way that ensures that all foreign insurers will pay retaliatory taxes, thus generating additional revenue for the State.[55]

We cannot agree with the dissent's portrayal of the retaliatory tax scheme because it fails to comport with the express language of the retaliatory tax statute. The dissent accuses us of employing a "myopic" view of the statute that gives credence to an "artificial allocation" of

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[53] 258 S.W.3d at 646.

[54] *Id.*

[55] The dissent's hypothetical compares two similarly situated insurers earning $1,000 in title premiums. The Texas insurer operating in another state is subject to a 2% premium tax in that state, resulting in a $20 tax payment. The foreign insurer and foreign agent operating in Texas are subject to a 1.35% premium tax—the insurer pays $2.03 on its 15% share, and the agent pays $11.47 on its 85% share. The foreign insurer also pays $17.97 in retaliatory tax. 258 S.W.3d at 646.

the premium tax burden based on payor,[56] but Article 21.46 is clear: the payor matters. The dissent's assertion that "[t]his tax was based on the burden imposed . . . on the insurance industry" ignores the statute's plain language.[57] The "relatively unchanged"[58] language of the retaliatory tax statute instructs the Comptroller to compare the tax burdens "imposed upon any *insurance company*" from Texas operating elsewhere with the tax burdens "directly imposed upon a similar *insurance company*" from elsewhere operating in Texas.[59] If a Texas insurer operating outside the state bears a heavier tax burden under this comparison, then the Comptroller "shall impose" a retaliatory tax "upon . . . any similar *company*" so long as the taxes imposed by Texas "on an *insurance company*" from out-of-state do not exceed the taxes imposed by another state "on a similar *insurance company*" from Texas.[60] Thus, the retaliatory tax is imposed only on insurers based only on the other tax burdens borne by insurers. The Comptroller does not, and cannot, compare the taxes on total premiums, take into consideration the taxes paid by agents, or look to the burden borne by the industry as a whole because the Legislature set the focus of the retaliatory tax scheme on a single entity—the insurance company.

Once we employ the same focus dictated by the Legislature—comparing the burdens borne only by title insurance companies—the dissent's numbers balance out. Under the dissent's hypothetical, a Texas insurer operating out-of-state pays $20 in premium taxes; the out-of-state insurer also pays $20—$2.03 of premium tax and

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[56] 258 S.W.3d at 645.

[57] *Id.*

[58] *Id.*

[59] Former TEX. INS. CODE art. 21.46, § 1(a) (emphasis added).

[60] *Id.* (emphasis added).

$17.97 of retaliatory tax. Thus, the retaliatory tax fulfills its role as an equalizer between similarly situated title insurers. Furthermore, when we focus on the proper tax base—the foreign insurer's $150 premium—the effective premium tax rate remains 1.35%—the statutorily designated rate.[61] As for the $11.47 tax burden borne by the foreign agent, a Texas agent operating in Texas would pay the same amount of premium tax, and the foreign operations of either Texas or foreign agents are not at issue because Article 21.46 neither aggregates an agent's tax burdens nor imposes the retaliatory tax on agents. The dissent expresses concern that the Comptroller's interpretation of the tax scheme would impose retaliatory tax on an insurer from a state with a lower premium tax rate than Texas, but this concern is misplaced. Article 21.46 does not impose a tax based on comparative tax *rates*; it does so based on comparative tax *burdens*. If, as in the dissent's example, another state applies a lower tax rate to a larger tax base in a way that requires a Texas insurer to pay more total taxes, then the retaliatory tax would properly apply to equalize the total taxes paid.

The dissent also argues that the Comptroller's interpretation fails to comply with the directive of Article 21.46 to impose the retaliatory tax "in the same manner and for the same purpose" as the taxes imposed on Texas insurers by foreign states. Specifically, the dissent asserts that the Comptroller's scheme compares the insurer's 15% premium tax burden in Texas with the full premium tax burden imposed in other states. The record flatly contradicts this assertion: the retaliatory tax worksheet filled out by First American provides for gross premiums earned, and then—recognizing that California, First American's home state, splits the premiums between insurers and agents—allows a reduction for "[p]re-

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[61] Former TEX. INS. CODE art. 9.59, § 4.

miums retained by underwritten title companies," what Texas would call title agents. Thus, the "[t]otal premiums subject to tax" are only those premiums retained by the title insurance company—precisely the "apples-to-apples" comparison the dissent calls for. Not all states split the tax burden between insurers and agents like Texas and California, but as we have already noted, Article 21.46 charges the Comptroller with assessing the retaliatory tax based on the burdens imposed on the insurer alone. If other states choose to impose the full premium tax on the insurer, then the Comptroller is not out-of-bounds—indeed she is only following the statutory mandate—by comparing that tax to the tax imposed on the insurer's 15% premium in Texas. The Comptroller's current interpretation may represent a change from past practice, but it is squarely in line with the 1987 legislative amendments that first established the agent-insurer pass-through premium tax collection system, which is all we require.[62]

In sum, First American and Old Republic have failed to show that the full amount of the title insurance premium tax is "directly imposed" upon them for purposes of Article 21.46. The Comptroller's interpretation of the retaliatory tax scheme comports with the plain language of the premium and retaliatory tax provisions of

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[62] *See Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 247, 249 (Tex. 1991) (upholding Comptroller's change in forty-two year franchise tax collection practice when change was in line with "the clear intent of the Legislature."). Nor is the change here as drastic as in *House of Lloyd*. The Comptroller's reinterpretation of the retaliatory tax scheme began less than ten years after the 1987 amendments to Article 9.59. *See* Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 22, 1987 Tex. Gen. Laws 3610, 3638-39 (amended 1993, 1997, 1999, 2001 and repealed 2003); *supra* note 13.

the Insurance Code; therefore, we reject the insurers' statutory claim.

IV. Equal Protection Rights

First American and Old Republic further argue that the Comptroller's interpretation of the retaliatory tax scheme violates their equal protection rights under the United States and Texas Constitutions. "[T]he federal analytical approach applies to equal protection challenges under the Texas Constitution,"[63] so resolution of the federal equal protection claim will also resolve the State equal protection claim. We conclude that the Comptroller's interpretation of the relevant statutes does not violate the insurers' equal protection rights.

The equal protection clause of the Fourteenth Amendment forbids a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[64] However, the Supreme Court has recognized that "most laws differentiate in some fashion between classes of persons"; therefore, unless a classification "jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic," the law will be upheld as long as it is rationally related to a legitimate state interest.[65] This rational-basis review requires us to answer two questions: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?"[66]

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[63] *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 266 (Tex. 2002).

[64] U.S. CONST. amend. XIV, § 1.

[65] *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

[66] *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

As we already noted, the Supreme Court previously upheld a retaliatory tax provision similar to Article 21.46, holding that the tax provision had a legitimate purpose of promoting "domestic industry by deterring barriers to interstate business."[67] The insurers argue that, unlike the California statute upheld by the Supreme Court, the Comptroller's application of the Texas retaliatory tax scheme neither promotes domestic title insurers nor deters foreign taxation; rather, the Texas law has the purpose and effect of raising revenue at the expense of foreign title insurers. To support their argument, the insurers point out that the Comptroller's new interpretation raises nearly three times more retaliatory tax revenue than the prior interpretation and taxes the 85% premium portion twice (once at the premium-tax stage and once at the retaliatory-tax stage). According to the insurers, these changes raise revenue but do not deter other states from taxing Texas-based insurers because foreign states would have to reduce premium tax rates by as much as 80% to match the premium tax burden imposed on insurers by Texas law as currently interpreted by the Comptroller. The insurers contend that other states will likely respond not by lowering premium tax rates but by counter-retaliating against Texas insurers.

We disagree that these effects necessarily demonstrate an impermissible purpose underlying the Comptroller's construction of the retaliatory tax scheme. The Comptroller did not develop this scheme independently as a revenue-raising plan; as we have already discussed, the Comptroller's interpretation is consistent with the statutory scheme developed by the Legislature. Furthermore, the Comptroller's construction of the retaliatory tax system does not impermissibly discriminate against foreign title insurers. All title insurers operating

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[67] *Id.* at 671, 101 S. Ct. 2070.

in Texas, whether domestic or foreign, are subject to the 85/15 premium tax division. Moreover, foreign title insurers are not taxed merely because they are foreign; they are taxed only if their home states impose higher financial obligations on Texas insurers than Texas imposes on foreign insurers. The Comptroller's application of the retaliatory tax scheme may result in an increase in retaliatory taxes collected, but the increase depends just as much on premium tax rates charged by other states as it does on the Comptroller crediting title insurers with only 15% of the total premium tax payment. Therefore, the Comptroller's interpretation exerts some downward pressure on foreign tax rates, regardless of how other states choose to respond. The Comptroller's implementation of the retaliatory tax scheme may have unforeseen or unintended results, but "the courts are not empowered to second-guess the wisdom of state policies. Our review is confined to the *legitimacy* of the purpose."[68] The Comptroller's interpretation demonstrates a legitimate state purpose of protecting Texas title insurers by pressuring other states to keep their premium taxes low.

As for the second prong of equal protection analysis, the challenged interpretation will survive "if we conclude that [the Comptroller] rationally could have believed that the retaliatory tax would promote its objective."[69] We have no trouble concluding that the Comptroller rationally could have believed that reducing the premium tax burdens Texas imposes on title insurers operating here would encourage other states to impose lower financial obligations on Texas title insurers operating elsewhere. The dissent disagrees, stating that "there is no rational basis for comparing 100% of another state's premium

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[68] *Id.* at 670, 101 S. Ct. 2070 (citation omitted).

[69] *Id.* at 672, 101 S. Ct. 2070 (emphasis omitted).

taxes with 15% of Texas' premium taxes,"[70] but again, the correct comparison is between the taxes imposed on insurance companies, not insurance premiums or insurance industries. The equal protection clause guarantees that similarly situated persons—not similarly situated tax schemes or similarly situated industries—be treated similarly. The Comptroller's interpretation of the retaliatory tax scheme equalizes the tax burdens borne by title insurers in a way that is rationally related to a legitimate state purpose; therefore, we reject the insurers' federal and state equal protection claims.

V. Conclusion

The Comptroller implemented the premium and retaliatory tax provisions in a way that comports with the plain meaning of those statutes without offending the United States or Texas Constitutions. We therefore affirm the court of appeals' judgment.

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[70] 258 S.W.3d at 646.

Justice HECHT, joined by Justice WAINWRIGHT, Justice BRISTER, and Justice MEDINA, dissenting.

Texas, like most other states,[1] taxes gross premiums for insurance of risks and property in the state,[2] and like every other state but Hawaii,[3] Texas imposes an additional retaliatory tax on out-of-state insurers doing business in Texas whose home states tax more heavily than Texas does, all other things being equal.[4] Such retaliatory taxes have been "a common feature of insurance taxation for over a century",[5] and though they obviously impinge on interstate commerce, they do not implicate the "implied limitation on the power of the States to interfere with or impose burdens on interstate commerce" contained in the Commerce Clause of the United States Constitution because "Congress removed all Commerce

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[1] CCH STATE TAX GUIDE, ALL STATES ¶ 88, at 9705 (2006) (stating that gross premiums taxes are "the most common form of insurance company tax" and are "imposed in every state upon some kind of insurance company").

[2] TEX. INS. CODE §§ 221.001-228.007.

[3] *Prudential Ins. Co. of Am. v. Comm'r of Rev.*, 429 Mass. 560, 709 N.E.2d 1096, 1098, 1099 n.7 (1999).

[4] TEX. INS. CODE §§ 281.001-.052, *formerly* TEX. INS. CODE art. 21.46. The retaliatory provision compares not just premium taxes but "the sum of the taxes or other charges, prohibitions, and restrictions imposed" on an insurer. *Id.* §§ 281.004(a)(2) ("The comptroller shall impose and collect a tax or other charge or a prohibition or restriction on a foreign insurer authorized to engage in business in this state if . . . the sum of the taxes or other charges, prohibitions, and restrictions imposed by that other state is more than the sum of the taxes or other charges, prohibitions, and restrictions that this state directly imposes on the foreign insurer."), 281.052 (providing for "a penalty or other obligation", under certain circumstances, to match the penalty or obligation imposed on a domestic insurer by the foreign insurer's state of organization). This case involves only taxes.

[5] *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act."[6] But the Fourteenth Amendment Equal Protection guaranty does not permit states to impose "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose."[7] "[T]he principal purpose of retaliatory tax laws is to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes."[8] The United States Supreme Court has held that this purpose is legitimate and that a retaliatory tax rationally related to it does not violate Equal Protection.[9]

Texas' retaliatory tax, first enacted in 1935[10] and con-

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[6] *Id.* at 652-653, 101 S. Ct. 2070; *id.* at 654, 101 S. Ct. 2070 ("The Court has squarely rejected the argument that discriminatory state insurance taxes may be challenged under the Commerce Clause despite the McCarran-Ferguson Act." (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 414, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946), and *Prudential Ins. Co. v. Hobbs*, 328 U.S. 822, 66 S. Ct. 1360, 90 L. Ed. 1602 (1946) (per curiam))).

[7] *Id.* at 668, 101 S. Ct. 2070 (internal punctuation omitted).

[8] *Id.*

[9] *Id.* at 671-672, 101 S. Ct. 2070.

[10] Act of May 2, 1935, 44th Leg., R.S., ch. 307, § 1, 1935 Tex. Gen. Laws 713, 713-714 ("Whenever, by any law in force without this State, an insurance corporation . . . of this State or agent thereof is required to make any deposit of securities . . . or to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, license fees, or otherwise, or any special burden is imposed, greater than is required by the laws of this State for similar foreign corporations or their agents, the insurance companies . . . of such States or governments shall be and they are hereby required as a condition precedent to their transacting business in this State, to make a like deposit for like purposes . . . and to pay . . . for taxes,

sistently applied until this case, falls squarely within the Supreme Court's holding. But in this case, the Comptroller has reinterpreted the statute as it applies to title insurers, multiplying the tax due and transforming it into a penalty on nonresident insurers doing business in Texas. This sudden departure from the settled application of the retaliatory tax was not prompted by any legislative revision of the statute or any change in retaliatory taxation in other states. The only apparent purpose for the Comptroller's new position is to generate revenue from nonresident title insurers simply because they are nonresident. In my view, the Comptroller has misconstrued the tax statute so that it now violates Equal Protection. Because the Court disagrees, I respectfully dissent.

When insurance is sold through an agent, the insurer and the agent share the premium revenue. For title insurance in Texas, the revenue division is set by the Commissioner of Insurance.[11] During the times material to

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fines, penalties, certificates of authority, valuation of policies, license fees and otherwise a rate equal to such charges and payments imposed by the laws of such other State upon similar corporations of this State and the agents thereof.") (amending former TEX. REV. CIV. STAT. art. 4758 (1925)), *repealed by* Act of May 28, 1945, 49th Leg., R.S., ch. 279, § 4, 1945 Tex. Gen. Laws 442, 445, *and by* Act of May 23, 1951, 52d Leg., R.S., ch. 491, § 4, 1951 Tex. Gen. Laws 868, 1093. The first retaliatory provision appears to have been enacted in 1909, but it referred only to different security deposit requirements in different states, not different taxes. Act approved Mar. 22, 1909, 31st Leg., R.S., ch. 108, § 29, 1909 Tex. Gen. Laws 192, 203, *formerly* TEX. REV. CIV. STAT. art. 4768 (1911), *then* TEX. REV. CIV. STAT. art. 4758 (1925).

[11] TEX. INS. CODE § 2502.054(b)(1)(B) ("This subchapter does not . . . prohibit a title insurance company from . . . arranging for a division of premiums with the agent as set by the commissioner . . . ."), *formerly* TEX. INS. CODE art. 9.30, § B(1) ("This Article may not be construed as prohibiting . . . a foreign or domestic title insurance company doing business in this state . . . from . . . making the ar-

this case, that division has been 15% to the insurer and 85% to the agent.[12] For decades, the retaliatory tax in Texas and other states has been determined by comparing the taxes on total premiums, not just the insurer's share. A few years ago, it is not clear exactly when, the Comptroller decided for the first time to compare other states' taxes on total premiums with Texas' tax on only the insurer's 15% share. Simply put, the Comptroller now takes the position that "total" means 100% in every other state and 15% in Texas.

Ordinarily, everything is bigger in Texas, and though "total" is now smaller here, taxes have increased. The Comptroller's "new math", as the Court refers to it, multiplies the retaliatory tax and discriminates against out-of-state insurers doing business in Texas. For example, suppose an insurer from a state with a 2% premium tax rate does business in Texas, where the rate is 1.35%. On a $1,000 premium, the total tax would be $20 in the other state and $13.50 in Texas. Requiring the out-of-state insurer to pay a $6.50 retaliatory tax on its Texas business equalizes the tax burden on the two insurers' business in each other's state. Each insurer and its respective agents would, together, pay $20 in taxes and collect $980 in revenue. But in the Comptroller's

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rangement for division of premiums with the agent as shall be set by the commissioner . . . .").

[12] *See* Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas § IV, P-23(f) ("During 2000, and thereafter until changed by the Commissioner, on all title insurance written by title insurance agents, the division of premiums between title insurance companies and title insurance agents shall be as follows: (1) title insurance companies shall receive 15% of each title insurance premium, and (2) title insurance agents shall receive 85% of each title insurance premium . . . ."), *adopted* 28 TEX. ADMIN. CODE § 9.1, *available at* http://www.tdi.state.tx.us/title/titlem4d.html #P-23.

view, the retaliatory tax is determined by the difference between the other state's $20 premium tax and the insurer's 15% share of Texas' $13.50 premium tax—$2.03—a difference of $17.97. Hence, the out-of-state insurer together with its respective agents pays $31.47 in taxes and collects $969.73 in revenue. The Comptroller's new math increases the out-of-state title insurer's tax burden merely because the insurer is out-of-state.

By artificially reducing the size of Texas' premium tax, the Comptroller's new position dictates that Texas impose retaliatory taxes even when insurers hail from states imposing lower premium taxes than Texas. Suppose an insurer from a state with a 1% premium tax does business in Texas. On a $1,000 premium, the Comptroller would compare the $2.03 insurer's share of the Texas tax to the $10 premium tax in the other state and assess a $7.97 surcharge. In essence, for purposes of applying the retaliatory tax, the Comptroller has reduced Texas' gross premiums tax rate by 85%, from 1.35% to 0.2025%. Virtually every other state taxes gross premiums, but none has so low a rate. The tax now applies to all out-of-state insurers doing business in Texas merely because they are not domestic companies. The retaliatory tax, thus construed, no longer operates to discourage excessive taxation in other states; it now operates to discourage foreign insurers from doing business in Texas.

The Comptroller's change in position transforms the retaliatory tax, long a means of equalizing tax burdens on domestic and foreign insurers doing business in Texas, into a penalty against out-of-state insurers. The Comptroller's new position is not based on any change in the law. The relevant statutory provisions have been materially the same for decades. The retaliatory tax statute imposes "a tax . . . on a foreign insurer if . . . the foreign insurer's state of organization . . . imposes a tax . . . on a

similar domestic insurer that is . . . more than the [tax] this state directly imposes on the foreign insurer."[13] The retaliatory tax must be "impose[d] and collect[ed] . . . in the same manner and for the same purpose" as the tax on the insurer in the other state.[14] These provisions, recodified in 2003,[15] were enacted in 1957[16] and derived from the

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[13] TEX. INS. CODE § 281.004(a) ("The comptroller shall impose and collect a tax or other charge or a prohibition or restriction on a foreign insurer authorized to engage in business in this state if: (1) the foreign insurer's state of organization by law imposes a tax or other charge or a prohibition or restriction on a similar domestic insurer that is or may be authorized to engage in business in that other state; and (2) the sum of the taxes or other charges, prohibitions, and restrictions imposed by that other state is more than the sum of the taxes or other charges, prohibitions, and restrictions that this state directly imposes on the foreign insurer.").

[14] *Id.* § 281.004(b) ("The comptroller shall impose and collect the tax or other charge, prohibition, or restriction under Subsection (a) in the same manner and for the same purpose as the foreign insurer's state of organization.").

[15] Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 1, 2003 Tex. Gen. Laws 3611, 3638-3641, 4138.

[16] Act of May 22, 1957, 55th Leg., R.S., ch. 396, § 1, 1957 Tex. Gen. Laws 1184, 1185 ("Whenever by the laws of any other state or territory of the United States any taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company organized in this State and licensed and actually doing business in such other state or territory which, in the aggregate are in excess of the aggregate of taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon a similar insurance company of such other state or territory doing business in this State, the Board of Insurance Commissioners of this State shall impose upon any similar company of such state or territory in the same manner and for the same purpose, the same taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions . . . ."), *formerly* TEX. INS. CODE art. 21.46.

first retaliatory tax statute enacted in 1935.[17] The premium tax statute imposes a "tax . . . on all premiums from the business of title insurance",[18] "regardless of whether paid to a title insurance company or retained by a title insurance agent",[19] to be paid by the insurer.[20] These provisions, also recodified in 2003,[21] and amended in 2007,[22] were enacted in 1987[23] and derived from prior premium tax statutes, the first one dating to 1893.[24]

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[17] *Supra* note 10.

[18] TEX. INS. CODE § 223.003(a) ("An annual tax is imposed on all premiums from the business of title insurance. The rate of the tax is 1.35 percent of title insurance taxable premiums for a calendar year, including any premiums retained by a title insurance agent".).

[19] *Id.* § 223.005(a) ("Premiums received from the business of title insurance are subject to the tax under this chapter regardless of whether paid to a title insurance company or retained by a title insurance agent, with the tax being in lieu of the tax on the premiums retained by a title insurance agent.").

[20] *Id.* § 223.005(b) ("The state facilitates the collection of the premium tax on the premiums retained by a title insurance agent by establishing the division of the premiums between the title insurance company and title insurance agent so that the company receives the premium tax due on the agent's portion of the premiums and remits it to the state.").

[21] Act of May 22, 2003, 78th Leg., ch. 1274, §§ 1, 26(b)(4), 2003 Tex. Gen. Laws 3611, 3622-3624, 4139.

[22] Act of May 27, 2007, 80th Leg., R.S., ch. 932, § 3, 2007 Tex. Gen. Laws 3194, 3195 (amending Section 223.003(a), which previously read: "An annual tax is imposed on each title insurance company that receives premiums from the business of title insurance. The rate of the tax is 1.35 percent of the title insurance company's taxable premiums for a calendar year, including any premiums retained by a title insurance agent".).

[23] Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 22, 1987 Tex. Gen. Laws 3610, 3638-3640, *formerly* TEX. INS. CODE art. 9.59 §§ 1 ("Each title insurance company receiving premiums from the business of title insurance shall pay . . . an annual tax on those premiums . . . ."), 8(b) ("The premium tax is levied on all amounts defined to be pre-

The Comptroller argues that the premium tax on the agent's 85% share of premiums is not "directly impose[d]" on the insurer within the meaning of the retaliatory tax statute, even though the insurer must remit the tax. In furtherance of its view, the Comptroller in 2001 adopted a rule limiting an insurer's liability for the premium tax to the amount due on its share.[25] The Comptroller acknowledges that no one took this position in the forty years after the phrase "directly imposes" was

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mium . . . , whether paid to the title insurance company or retained by the title insurance agent . . . . The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.").

[24] Act approved May 11, 1893, 23d Leg., R.S., ch. 102, § 1, 1893 Tex. Gen. Laws 156. The premium tax statutes have been frequently amended, and codified over the years as TEX. REV. CIV. STAT. art. 5243e (1895) (taxing "gross premium receipts" of "every life, fire, marine, accident, or other insurance company"), TEX. REV. CIV. STAT. art. 7376 (1911), and TEX. REV. CIV. STAT. art. 7064 (1925). Article 7064 was amended by Act of May 29, 1981, 67th Leg., R.S., ch. 844, § 1, 1981 Tex. Gen. Laws 3212, 3212-3215 and later recodified as articles 4.10 (applicable to title insurance companies) and 4.11 of the Insurance Code. Act of May 31, 1981, 67th Leg., R.S., ch. 389, § 36, 1981 Tex. Gen. Laws 1490, 1780-1784. Article 4.10 was, in turn, amended by Act of May 30, 1983, 68th Leg., R.S., ch. 283, 1983 Tex. Gen. Laws 1367 and Act of May 24, 1985, 69th Leg., R.S., ch. 161, §§ 3-4, 1985 Tex. Gen. Laws 715, 716. Eventually, in 1987, separate provisions for title insurance were enacted and codified at art. 9.59. Act of June 1, 1987, 70th Leg., R.S., ch. 1073, §§ 22, 23, 1987 Tex. Gen. Laws 3610, 3638-3641. Currently, provisions for gross premium taxes on various kinds of insurance are found in Chapters 221 through 226 of the Insurance Code. Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 1, 2003 Tex. Gen. Laws 3611.

[25] 34 TEX. ADMIN. CODE § 3.831(4)(c) ("Title insurers and title agents are both subject to the premium and maintenance tax on their proportional share of the premiums and are separately liable for the tax if the insurer fails to remit the tax due on the agent's portion.").

adopted in the 1957 statute, or in the ten years after the premium tax imposition and collection provisions were detailed in 1987. The Comptroller's position not only discards a settled, decades-old application of statutory provisions frequently revisited and left substantively unchanged by the Legislature, it contradicts the purpose of a tax in place since at least 1935. This tax was based on the burden imposed by other states on the insurance industry and not on an artificial allocation of the tax burden between insurers and their agents.

The Court concludes that the Comptroller's reinterpretation of the statute is due deference under *Tarrant Appraisal District v. Moore*.[26] While an agency's initial interpretation of a statute "is not carved in stone",[27] an agency's decision to depart from a longstanding interpretation is entitled to "considerably less deference" unless the agency provides some reasonable explanation for the change.[28] This is particularly so where the agency's ear-

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[26] 845 S.W.2d 820, 823 (Tex. 1993) ("[C]onstruction of a statute by an administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute.").

[27] *Rust v. Sullivan*, 500 U.S. 173, 186, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (quoting *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 863, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (an agency has ample latitude to adapt its rulings or policies to changing circumstances).

[28] *Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981); *see Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698, 111 S. Ct. 2524, 115 L. Ed. 2d 604 (1991) (though an agency decision to reinterpret a statute is entitled to *Chevron* deference, such an interpretation is "less persuasive"); *Rust*, 500 U.S. at 187, 111 S. Ct. 1759 (the agency provided "reasoned analysis" to support its changed interpretation); *Flores v. Employees Ret. Sys.*, 74 S.W.3d 532, 544-545 (Tex. App.–Austin 2002, pet. denied) (an agency must explain a decision to depart from a longstanding policy); *City of El*

lier interpretation is accompanied by legislative acquiescence.[29]

But even if the Comptroller's interpretation of "directly imposed" were entitled to more serious consideration, the plain language of the rest of the statute makes clear that the new interpretation is unreasonable.[30] The statute clearly requires the Comptroller to make apples-to-apples comparisons. Section 281.004 instructs the Comptroller to impose and collect the retaliatory tax "in the same manner and for the same purpose" as the foreign insurer's state tax. The Court insists that the retaliatory tax focuses on the insurance company to the exclusion of agents, but it is myopic to view a tax on gross revenue as affecting only some of the participants in the business who must share that revenue. One cannot assume that insurers and agents in other states do not share premium revenues merely because Texas has a statute specifying how they must do so. Indeed, one must assume that insurers and agents expect to be paid and to share in premium revenue. If only the insurer's share of the Texas premium tax is to be considered, then

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Paso v. El Paso Elec. Co., 851 S.W.2d 896, 900 (Tex. App.–Austin 1993, writ denied).

[29] *See Stanford v. Butler*, 142 Tex. 692, 181 S.W.2d 269, 273 (1944) (contemporaneous construction of an act by those charged with its enforcement is "'worthy of serious consideration as an aid to interpretation, particularly where the construction has been sanctioned by long acquiescence. Although a contemporaneous or practical construction is not absolutely controlling, it has much persuasive force and is entitled to great weight in determining the meaning of an ambiguous or doubtful provision.'") (citations omitted).

[30] *Continental Cas. Co. v. Downs*, 81 S.W.3d 803, 807 (Tex. 2002) ("Construction of a statute by the agency charged with its enforcement is entitled to serious consideration only if that construction is reasonable and does not contradict the statute's plain language.") (citations omitted).

that share must be compared to the insurer's share of the premium tax in the other state. But by comparing only the insurer's share of the Texas premium tax to another state's undivided premium tax, the Comptroller imposes and collects the retaliatory tax in a different manner and for a different purpose than the other state in imposing and collecting its tax.

There is another equally important reason to reject the Comptroller's new interpretation: it makes no sense. In *Western & Southern*, the Supreme Court acknowledged that a state has a legitimate interest in promoting interstate commerce by "deterring other States from enacting discriminatory or excessive taxes."[31] But there is no rational basis for comparing 100% of another state's premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive. Texas' legitimate interests in deterring excessive taxation by other states are not served by retaliating whenever another state's industry-wide tax would exceed Texas' tax on some of the participants, or whenever another state employs a different accounting method for calculating and assessing premium taxes. Nor is it served by retaliating against states whose total premium taxes are lower than Texas'. Under the Comptroller's new construction, the retaliatory tax provisions have been transformed into a means for blatant and unapologetic discrimination against out-of-state insurers and parochial protectionism.

The Court asserts that "the Comptroller's interpretation is consistent with the statutory scheme developed by the Legislature",[32] but the fact is that the Comptroller and others who administered the retaliatory tax for decades thought a contrary interpretation was required

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[31] 451 U.S. at 668, 101 S. Ct. 2070.

[32] *Ante* at 639.

by the statute. The Court adds that "[t]he Comptroller did not develop this scheme independently as a revenue-raising plan",[33] but no other basis for the "scheme" has been advanced, and none is apparent. The Comptroller's sudden multiplication of the retaliatory tax cannot serve the legitimate state purpose of discouraging excessive taxation in other states because even when a state's tax rate is a fraction of the rate in Texas, insurers from that state must, in the Comptroller's view, pay a retaliatory tax.

I agree with the Court that whether other states may react in a way that is ultimately unfavorable to Texas insurers, or whether the Comptroller's position may have other "unforeseen or unintended results", is none of our business. But it is certainly our business to ensure that persons similarly situated are afforded the equal protection of the law guaranteed by the Fourteenth Amendment. The Court concludes that the retaliatory tax remains "an equalizer between similarly situated title insurers."[34] The Comptroller's treatment of Texas title insurers doing business in other states and out-of-state title insurers doing business in Texas is as equal as 15 is to 100.

I would hold that the Comptroller's position is not permitted by the text of the retaliatory tax statute or by the Fourteenth Amendment. Accordingly, I respectfully dissent.

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[33] *Ante* at 639.

[34] *Ante* at 637.

APPENDIX B

IN THE COURT OF APPEALS OF TEXAS, AUSTIN

NO. 03-04-00342-CV

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Appellants,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS AND GREGG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Appellees.

JUNE 3, 2005

Before Justices B.A. SMITH, PURYEAR and PEMBERTON.

DAVID PURYEAR, Justice.

First American Title Insurance Company and Old Republic National Title Insurance Company sell title insurance in Texas but are incorporated in other states. They are seeking to recover taxes they argue were unlawfully imposed upon them. Texas imposes a tax on the amount of premium collected from title insurance policies. In addition, foreign title insurance companies, like First American and Old Republic, are required to pay an additional tax if their states of origin impose financial burdens on Texas insurance companies selling title insurance in the foreign states that are higher than the finan-

cial burdens Texas imposes upon foreign insurance companies selling title insurance here. This additional tax is called a retaliatory tax.

Previously title insurance companies have been allowed to include 100% of the total premium tax paid as part of their imposed financial burden for the purpose of determining whether a retaliatory tax needs to be paid. However, the Comptroller changed this previous interpretation and concluded that, because insurance companies pay only 15% of the premium tax, insurance companies should include only 15% of the premium tax as part of their total imposed financial burden. Under this new interpretation, foreign title insurance companies will be required to pay significantly more in retaliatory taxes.

First American and Old Republic contend that the Comptroller's new interpretation is wrong and seek to recover taxes they claim were unlawfully assessed under the Comptroller's new interpretation.[1] The district court granted summary judgment in favor of the Comptroller, and we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

First American is a California-based title insurance company, and Old Republic is a Minnesota-based title insurance company. Title insurance companies ("insurers") are responsible for issuing title insurance policies, for insuring title risks, and for paying claims and providing defenses to claims if necessary. Both First American and Old Republic engage in title insurance business within the State of Texas.

First American issues title policies through title agents and through direct operations. Old Republic is-

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[1] Both First American and Old Republic filed suits seeking to recover taxes they had paid. After the district court granted summary judgment in favor of the Comptroller, both cases were consolidated into this appeal.

sues title policies through title agents alone. Title agents are legal entities, such as corporations, that are separate from insurers and that are licensed to close real estate title insurance transactions on behalf of one or more insurers. Title agents may be affiliated with an insurer or may be completely independent. If an insurer becomes licensed as a direct operator, then it may close insurance transactions on its own without an agent.

Article 9.59 of the insurance code ("the premium tax statute") requires title insurers to remit to the state a tax on insurance premiums collected while engaged in business in Texas. *See* Tex. Ins. Code Ann. art. 9.59 (West Supp. 2004-05), *repealed by* Act of April 30, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (effective April 1, 2005). In addition, article 21.46 of the insurance code ("the retaliatory tax statute") requires the imposition of an additional tax on foreign insurers doing business within Texas if the foreign state imposes financial burdens on Texas-based insurers doing business in the foreign state that are higher than the financial burdens Texas places on the foreign state's insurers doing business here. *See* Tex. Ins. Code Ann. art. 21.46 (West Supp. 2004-05), *repealed by* Act of April 30, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (effective April 1, 2005). The principal purpose of a retaliatory tax law is to facilitate the ability of insurers to conduct business across state lines by deterring states from enacting discriminatory or excessive taxes against foreign insurers. *See Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

In the late 1990s, the Comptroller took the position that the premium tax statute required title insurance agents to pay a portion of the premium taxes due and that the payment of title insurance premium taxes is not solely the obligation of insurers. Previously, insurers had

been allowed to include 100% of the premium tax paid as the insurers' tax burden for the purposes of determining whether a retaliatory tax would be imposed on an insurer. Under the new calculation method, an insurer may only count 15% of the premium tax as its financial burden when determining the amount of retaliatory taxes due, if any.

After auditing First American's 1998-2001 insurance tax reports, the Comptroller assessed a fee of $175,383.77 in retaliatory taxes and interest against First American for the 2001 tax year,[2] which First American paid in March 2003 under protest. In addition, First American paid, under protest, $1,257,196.99 in retaliatory taxes for 2002. Similarly, after an audit, the Comptroller assessed retaliatory taxes against Old Republic. Old Republic paid, under protest, $219,626.40 as retaliatory taxes for 2002.

PROCEDURAL HISTORY

Appellants filed separate lawsuits against the Comptroller and the Attorney General of Texas (cumulatively the "Comptroller") to recover what they claim were unlawfully assessed retaliatory taxes that were paid under protest. The appellants and the Comptroller both filed cross-motions for summary judgment in the separate cases, which the trial court heard simultaneously. The trial court granted summary judgment in favor of the Comptroller in both cases. Both appellants appealed the decision of the trial court, and the two cases were consolidated into this appeal.

STANDARD OF REVIEW

The standards for review of a traditional summary judgment are well established: the movant must show that there is no genuine issue of material fact and that it

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[2] The tax years of 1998-2000 are not at issue in this case.

is entitled to judgment as a matter of law; in deciding whether there is a disputed material fact issue precluding summary judgment, the court must take evidence favorable to the nonmovant as true, and the court must indulge every reasonable inference in favor of the nonmovant and resolve any doubts in the nonmovant's favor. *Sergeant Enters., Inc. v. Strayhorn*, 112 S.W.3d 241, 245 (Tex. App.–Austin 2003, no pet.) (citing *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985)). We review the trial court's decision to grant summary judgment de novo. *Id.* (citing *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994)).

Generally, a party cannot appeal the denial of a motion for summary judgment because it is an interlocutory order and, thus, not appealable. *Id.* (citing *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996)). However, when both parties move for summary judgment and the district court grants one motion and denies the other, the unsuccessful party may appeal both the grant of the prevailing party's motion and the denial of its own. *Id.* (citing *Holmes v. Morales*, 924 S.W.2d 920, 922 (Tex. 1996)). In such a case, we will review the summary judgment evidence offered by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *Id.* (citing *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000); *Commissioners Court v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997)). Because the district court did not state the basis for granting summary judgment, the appellants must negate all grounds that support the judgment. *Id.* (citing *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 381 (Tex. 1993)). However, if the appellants fail to negate each ground on which the judgment may have been rendered, we must uphold the summary judgment. *Id.* (citing *Carr*, 776 S.W.2d at 569).

This case involves interpreting the title insurance premium tax statute and the retaliatory tax statute, and, therefore, we apply a de novo standard. *Lopez v. Texas Workers' Comp. Ins. Fund*, 11 S.W.3d 490, 494 (Tex. App.–Austin 2000, pet. denied) (citing *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989)). When construing a statute, the court must construe the statute as written and must, if possible, determine the legislature's intention from the language that was used in the statute. *Del Indus., Inc. v. Texas Workers' Comp. Ins. Fund*, 973 S.W.2d 743, 745 (Tex. App.–Austin 1998), *aff'd*, 35 S.W.3d 591 (Tex. 2000). When determining legislative intent, the entire act, not isolated portions of the act, must be considered. *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998). Courts should first look to the plain meaning of the words in the statute and, if the meaning is unambiguous, interpret the statute so that it comports with the plain meaning expressed. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). Every word, phrase, and expression used in a statute should be read as if it were deliberately used. *See Gables Realty Ltd. P'ship v. Travis Cent. Appraisal Dist.*, 81 S.W.3d 869, 873 (Tex. App.–Austin 2002, pet. denied). If two statutes are in pari materia or address the same subject, then an effort should be made to harmonize and give effect to both statutes. *Breeding v. State*, 762 S.W.2d 737, 739 (Tex. App.–Amarillo 1988, pet. ref'd) (citing *Cheney v. State*, 755 S.W.2d 123 (Tex. Crim. App. 1988)).

When enacting a statute, the legislature is presumed to have intended to comply with both the state and the federal constitutions. *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990). Therefore, when construing a statute, courts should interpret a statute so that the statute's meaning is consistent with all constitutional requirements if possible. *Id.* In addition, when an administrative agency is charged with a statute's en-

forcement and also construes the statute, the agency's construction of the statute is entitled to serious consideration as long as the construction is reasonable and does not contradict the plain meaning of the statute. *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

STATUTORY FRAMEWORK

Before addressing the merits of the appellants' claims, it will be helpful to describe the statutory scheme in question in this case and the Comptroller's current interpretation of it. In 1907, the legislature first imposed a title insurance premium tax upon insurers. *See* Act of May 16, 1907, 30th Leg., 1st C.S., ch. 18, § 8, 1907 Tex. Gen. Laws 479, 482. In 1987, the insurance premium tax statutes were amended. Act of June 17, 1987, 70th Leg., R.S., 1987 Tex. Gen. Laws 3610, 3638-40 (codified as Tex. Ins. Code Ann. art. 9.59). As part of the amendment, a provision calling for the division of premium between insurers and title agents and a provision requiring insurers to obtain an agent's portion of the premium tax and to remit it to the state were added. *Id.* The relevant portions of the premium tax statute read as follows:

> Sec. 1. Each title insurance company receiving premiums . . . shall pay to the Comptroller a tax on those premiums . . . .
>
> Sec. 2. In this article premium means the total amount of premiums received for the taxable year on title insurance written on property located in this state . . . .
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> . . . .
>
> Sec. 4. There is imposed on all premium on title insurance an annual tax equal to 1.35 percent.
>
> Sec. 5. Each title insurance company that is liable under this article to remit tax on premium shall file a tax return annually . . . .

. . . .

> Sec. 8(a) Title insurance companies and title insurance agents *subject to the tax levied by this article may not be required to pay any additional tax in proportion to their gross premium receipts* levied by this state or any county or municipality except as otherwise provided by this code and the Labor Code . . . .
>
> (b) The premium tax is levied on all amounts defined to be premium in this Chapter, whether paid to the title insurance company or retained by the title insurance agent, such tax being in lieu of the tax on the premium retained by the agent. The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent *so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.*

Tex. Ins. Code Ann. art. 9.59 (West Supp. 2004-05) (emphasis added).

The premium tax statute exempts title agents, which are subject to taxation under the statute, from paying an *additional* tax based on gross premium receipts. *Id.* § 8(a). In addition to the section 8(a) exemption, section 171.052 of the Texas Tax Code exempts agents and insurers from franchise taxes because both are required to pay a tax based on gross premium receipts. Tex. Tax Code Ann. § 171.052 (West Supp. 2004-05). Specifically, section 171.052 provides as follows:

> An insurance organization, title insurance company, or title insurance agent authorized to engage in insurance business in this state now required to pay an annual tax under Chapter 4 or 9, Insurance

> Code, measured by its gross premium receipts is exempted from the franchise tax . . . .

Id.

The premium tax statute also states that premiums collected are divided between insurers and agents in such a way that insurers receive the agents' shares of the premium tax in the amount collected from the agents. Tex. Ins. Code Ann. art. 9.59 § 8(b). How the premium is divided between insurers and agents and what premium rates are charged are both questions decided by the Texas Department of Insurance (the "Department"). *See* Tex. Ins. Code Ann. arts. 9.07(b), (c) and 9.30(B)(1) (West Supp. 2004-05). In determining reasonable premium rates, the Department is required to consider all relevant income and expenses of title agents and insurers. *Id.* art. 9.07(b), (c). Between 2001 and 2002, the time period in issue in this case, the Department allowed title agents to keep 85% of the premiums collected from policyholders and required title agents to remit 15% of the premiums to title insurers.[3] 28 Tex. Admin. Code § 9.1 (2004) (adopting Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in Texas) (*available at* www.tdi.state.tx.us/company/titlem4d.html#P-23).

In addition to paying premium taxes, insurers from a foreign state doing business in Texas may be required to pay a retaliatory tax. The retaliatory tax statute imposes an additional tax upon a foreign insurer doing business in the state of Texas if the foreign state imposes financial burdens on Texas-based insurers doing business in the foreign state that are higher than the financial burdens Texas places on the foreign state's insurers doing busi-

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[3] In this appeal, we are not faced with and do not address whether the specific division of premium between agents (85%) and insurers (15%) is reasonable.

ness in Texas. The relevant portion of the retaliatory tax statute reads as follows:

> Whe[never] by the laws of any state or territory of the United States any taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company that is organized in this State and licensed and is doing business or that may do business in such other state or territory which, in the aggregate are in excess of the aggregate of the taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon a similar insurance company of such other state or territory doing business in this State, the comptroller shall impose upon and collect from any similar company of such state or territory in the same manner and for the same purpose, the same taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions; provided, however, the aggregate of taxes, licenses, fees, fines, penalties or other obligations imposed by this State pursuant to this Article on an insurance company of another state or territory shall not exceed the aggregate of such charges imposed by such other state or territory on a similar insurance company of this State that may be licensed and doing business.

Tex. Ins. Code Ann. art. 21.46 § 1(a).

Under the terms of the retaliatory tax statute, foreign insurers are required to file a report for the purpose of determining whether a retaliatory tax needs to be assessed against the insurers. *Id.* § (1)(d). Instructions for the Texas Title Agent Statistical Report, which is issued

by the Department and is filed with the Commissioner of Insurance, require insurers to list premiums collected and various expenses imposed upon them. Although insurers had previously been allowed to include 100% of the premium tax in the retaliatory tax calculation, the Comptroller changed the previous interpretation of the retaliatory tax scheme, which she may do as long as the new interpretation does not contradict either statutory language or a formally promulgated rule. *See Moore*, 845 S.W.2d at 823 (agency's construction of statute entitled to deference as long as does not contradict statutory language); *Grocers Supply Co., Inc. v. Sharp*, 978 S.W.2d 638, 642 (Tex. App.–Austin 1998, pet. denied) (Comptroller's informal change in policy of how rule enforced did not "informally contravene the express terms of a formally promulgated rule."). Under the new interpretation, insurers are allowed to include only 15% of the premium tax for the purpose of determining the amount of retaliatory taxes, if any, to be paid.

When developing the new interpretation of the retaliatory tax scheme in which agents share responsibility for paying premium taxes, the Comptroller relied upon the fact that agents are exempt from paying franchise taxes or "additional" premium taxes. *See Gables Realty Ltd. P'ship*, 81 S.W.3d at 873 (statutes should be construed to give meaning to every word). Further, the Comptroller reasoned that because section 8(b) of the premium tax statute specifies that insurers receive the agents' portion of the premium tax due when the premium is divided among the agent and the insurer and because the Department has specified that title agents are to transfer 15% of the premium collected to the insurers, then only 15% of the premium tax is directly imposed on the insurer. Therefore, the insurer should only be allowed to include 15% of the premium tax for the purposes of cal-

culating a retaliatory tax. *See* Tex. Ins. Code Ann. art. 9.59 § 8(b).

After adopting this new interpretation, the Comptroller, in 1996, instituted a policy that makes title agents responsible to the Comptroller for any portion of premium tax that is not remitted to insurers. *See* Tex. Ins. Code Ann. art. 9.59 § 3(c) (allowing Comptroller to create rules, limitations, minimum standards, and regulations that are fair, reasonable, and appropriate). This policy limited the insurers' obligation to remit premium tax actually collected if an insurer can prove that the title agent did not remit the portion of the premium the agent is required to give to the insurer. In 2000, the policy was published on the Internet based State Tax Automated Research System. *See* Texas Comptroller of Public Accounts, Star System No. 200009751L *available at* http://aixtcp.cpa.state.tx.us/star.

In addition, in 2001, the Comptroller amended rule 3.831, describing agents' and insurers' responsibilities for paying premium taxes. Under the amended rule, insurers are instructed to collect the premium tax due on the agents' portion of the premium and remit to the Comptroller both the agents' and the insurers' portions of the premium tax. *See* 34 Tex. Admin. Code § 3.831(4)(B), (D) (2004) (Insurance Tax: Gross Premiums Definitions . . . and Clarification of the Taxation on the Distribution of Title Premiums). Further, section 3.831(4)(C) holds agents and insurers separately liable for their share of the premium tax. *Id.* § 3.831(4)(C). Specifically, section 3.831(4)(C) reads as follows:

> Title insurers and title agents are both subject to the premium and maintenance tax on their proportional share of the premiums and are separately liable if the insurer fails to remit the tax due on the agent's portion.

Id.

DISCUSSION

On appeal, the appellants make the following three claims: (1) foreign-based insurers are entitled to include 100% of the premium taxes paid to the state of Texas in its calculation of the amount of retaliatory taxes owed; (2) agents do not, in fact, bear legal responsibility to pay 85% of the premium tax; and (3) the Comptroller's new interpretation of the retaliatory tax scheme is unconstitutional. For ease of reading, we will combine appellants' first two points.

The Comptroller's Interpretation is Reasonable

Appellants contend that the Comptroller's interpretation of the retaliatory tax scheme is incorrect. First, appellants assert that insurers are solely responsible for paying 100% of the premium tax and, similarly, assert that the obligation to pay premium taxes is not imposed on agents. In support of their assertions, appellants point to section 111.016(a) and (b) of the tax code for the proposition that insurers will still have to pay 100% of the premium tax if agents do not transfer 15% of the premium to insurers. *See* Tex. Tax Code Ann. § 111.016(a), (b) (West 2001). Section 111.016(a) states, in relevant part, that "any person who receives or collects a tax or any money represented to be a tax from another person holds the amount so collected in trust for the benefit of the state and is liable for the full amount collected plus any accrued penalties and interest on the amount collected." *See* Tex. Tax Code Ann. § 111.016(a). Section 111.016(b) states, in relevant part, that "an individual who controls or supervises the collection of tax or money from another person . . . and who willfully fails to pay or cause to be paid the tax or money is liable as a responsible individual for an amount equal to the tax or money not paid or caused to be paid." *See* Tex. Tax Code Ann. § 111.016(b).

However, neither of these sections state that an insurer would be liable for the full amount of premium tax if agents do not turn over their share of the premium tax. Further, subsection (a) states that the person has to receive the tax in question in order to be held liable for the amount in question, and subsection (b) states that the responsible party must have willfully refused to pay the tax collected on behalf of another. Neither of these scenarios address the situation of agents refusing to turn over their portion of the premium tax to insurers.

As further support for the assertion that there is no premium tax imposed on agents, appellants point to the first sentence of section 8(b) of the premium tax statute, which states that "[t]he premium tax is levied on all amounts defined to be premium . . . whether paid to the title insurance company or retained by the . . . agent, such tax being in lieu of the tax on the premium retained by the agent . . . ." Tex. Ins. Code Ann. art. 9.59 § 8(b). However, this sentence must also be read along with the last sentence of section 8(b), which states that the insurer receives the agent's portion of the premium tax due when the premium is divided between the agent and the insurer. *See id.* When read together, the "in lieu of" provision means that one comprehensive tax is formulated based on the total amount of premium with insurers collecting that portion of the premium that includes the agent's portion of the premium tax. *See Jones*, 969 S.W.2d at 432 (entire act, not isolated parts, must be considered). Although the statute requires title insurers to remit all of the premium tax to the Comptroller, the statute does not place all of the financial burden on the insurer.

Appellants also argue that the Comptroller's erroneous interpretation of the retaliatory tax scheme in which agents are responsible for paying 85% of the premium tax is based, in part, on an incorrect and isolated reading of section 8 of the premium tax statute, which contains

the following language: "Title insurance companies and title insurance agents *subject to* the tax levied by this article . . . ." Tex. Ins. Code Ann. art. 9.59 § 8(a) (emphasis added). Appellants claim that agents can be "subject to" paying a tax without actually having to pay a tax. Further, appellants urge that, rather than meaning a tax must be paid, the phrase "subject to" in section 8(a) means to bring under dominion, control, or authority. *See Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 298-99 (Tex. App.–Austin 2001, no pet.) (court construed statute to mean taxpayer "subject to" taxation if there was possibility that state might impose taxation, not if individual actually required to pay tax). From this assertion, appellants contend that agents are subject to taxation because a tax could be legally imposed on agents but is not, and appellants insist that section 8 is only an exclusionary provision exempting insurers and agents from other taxes but does not impose taxes on anyone. However, the premium tax statute contradicts appellants' assertion that agents are not responsible for paying any portion of the premium tax by stating that taxes on agents' portions of the premium collected are included within the portions transferred from agents to insurers after the premium has been divided. Tex. Ins. Code Ann. art. 9.59 § 8(b); *see also City of San Antonio*, 111 S.W.3d at 25 (if meaning unambiguous, statute should be interpreted to comport with that meaning).

In addition, appellants insist that the Comptroller's interpretation of the retaliatory tax scheme, under which both agents and insurers are liable for premium taxes, leads to absurd conclusions and unjust discrimination against foreign insurers, and, therefore, the previous interpretation should be reimplemented. *See Cramer v. Sheppard*, 140 Tex. 271, 167 S.W.2d 147, 155 (Tex. 1942) (statutory provisions will not be interpreted in way that leads to "absurd conclusions, great public inconvenience,

or unjust discrimination" if another interpretation can reasonably be made). Appellants assert that, because insurers bear the responsibility to remit 100% of the premium tax to the state, the premium tax is a tax "directly imposed upon" insurers as described in the retaliatory tax statute. *See* Tex. Ins. Code Ann. art. 21.46 (requiring, for purposes of calculating retaliatory taxes, comparison of obligations imposed on foreign insurers doing business in Texas with obligations imposed on Texas insurers doing business in foreign state). Appellants contend that there is no statute or formal rule that would excuse a title insurer from having to pay the full premium tax if an agent does not remit 15% of the total premiums collected to the insurer and contend that the Comptroller has no statutory authority to collect premium from agents in the event that an agent fails to transfer the premium to an insurer; therefore, appellants insist insurers will be held liable for the full amount of premium taxes regardless of whether agents transfer the premium or not. Further, appellants assert that if insurers do not pay 100% of the premium tax due because an agent has not transferred the premium, they will be subject to a collection proceeding for the amount not paid, and the Department may revoke its license to transact business in Texas. *See* Tex. Ins. Code Ann. arts. 9.59 § 9 ("A title insurance company failing to pay all taxes imposed by this article is subject to Article 4.05 of this code."); 4.05 (West Supp. 2004-05) (authorizing collection proceeding to collect taxes due on unreported gross premium receipts), *repealed by* Act of April 30, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (effective April 1, 2005); 9.28 (West 1981) (authorizing revocation of certificate of authority to transact business if insurer does not comply with provisions of insurance code), *repealed by* Act of April 30, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (effective April 1, 2005).

Appellants assert that allowing insurers to include only 15% of the premium tax in the retaliatory tax calculation even though the insurers will be responsible for the full amount and may be subjected to the sanctions listed above is discriminatory and absurd.

However, as mentioned, the Comptroller amended rule 3.831 to codify the new interpretation that agents are proportionally liable for premium taxes. 34 Tex. Admin. Code § 3.831(4)(C). In addition, the Comptroller published a policy providing insurers a defense to being held responsible for all premium taxes if an agent does not remit its share of the premium tax due. The Comptroller's interpretation, the amended rule 3.831, and the Comptroller's published policy protect insurers from being responsible for the full amount of premium taxes if the agent does not remit its portion of the premium tax. The Comptroller's interpretation, policy, and rule do not lead to absurd conclusions or unjust discrimination; on the contrary, they protect insurers from being unfairly held liable for taxes they do not pay or owe.

Alternatively, appellants argue that, even if agents are responsible for 85% of the tax, then the duty to remit 100% of the premium tax to the state qualifies as an "other obligation . . . directly imposed" on insurers under article 21.46, and, therefore, 100% of the premium tax should be included in the retaliatory tax calculation. *See* Tex. Ins. Code Ann. art. 21.46. Appellants assert that the phrase "other obligations" as listed in article 21.46 focuses on obligations that are directly imposed on an insurer, not on who bears the monetary burden, and extends beyond the legal liability for the tax and includes the obligation to remit the tax to the state. *See* Tex. Tax Code Ann. § 101.003(11) (West 2001) (obligation is "the duty of a person to pay a tax, fee, assessment, or other amount").

However, administrative duties to remit taxes collected from another entity without financial implications that can be quantified are not the type of "other obligations" that need to be included when performing the retaliatory calculation to determine what retaliatory taxes, if any, should be assessed. On the contrary, because all the other obligations listed before the phrase "other obligations" refer to financial obligations, the rule of ejusdem generis implies that the phrase "other obligations" also refers to obligations that have financial, not ministerial, implications.[4] *See Hilco Elec. Coop. v. Midlothian Butane Gas Co., Inc.*, 111 S.W.3d 75, 81 (Tex. 2003) (rule of ejusdem generis "provides that when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation.").

Contrary to the appellants' assertions, the Comptroller's new interpretation and rule 3.831 do not impose additional restrictions, conditions, or burdens that are inconsistent with either the retaliatory tax statute or the premium tax statute. *See Hollywood Calling v. Public Util. Comm'n of Tex.*, 805 S.W.2d 618, 620 (Tex. App.–Austin 1991, no writ) (rule "may not impose additional burdens, conditions, or restrictions beyond or inconsistent with the statutory provisions."). Rule 3.831(4)(C) does not directly contradict any statutory language because the premium tax statute states that an agent's portion of the premium tax is included within the division of premium transferred to the insurer, here 15%. In addition, the retaliatory tax statute only requires inclusion of

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[4] Because the Department is required to consider insurers' relevant expenses for the purposes of setting premium rates, we will presume that the Department accounted for the obligation of remitting agents' portions of the premium tax.

financial obligations "directly imposed" on an insurer. Further, the new interpretation and the rule do not run counter to the general objectives of the retaliatory tax statute or impose any burdens that are in excess of or inconsistent with the statute. The retaliatory tax statute is designed to equalize burdens imposed on Texas-based insurers by foreign states and the burdens imposed by Texas on foreign-based insurers. The rule and the Comptroller's new interpretation make insurers responsible for the portion of premium taxes they actually pay. Including what the insurers are actually responsible for in the retaliatory tax equation does not contravene the objectives of the statute; on the contrary, it actually enforces the objectives. The fact that insurers may have to pay more as retaliatory taxes than was required before as a result of including only the amount insurers actually pay in premium taxes does not impose an additional tax in excess of statutory objectives. Rather, the new interpretation and rule impose the burden contemplated by the retaliatory tax statutory scheme. Enacting this rule and adopting the Comptroller's new reasonable interpretation of the retaliatory tax scheme, which facilitate the purpose of the retaliatory tax scheme, were not, as suggested by the appellants, abuses of discretion. *See Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd. of the Tex. Dep't of Transp.*, 156 S.W.3d 91, 102 (Tex. App.–Austin 2004, pet. filed) (when determining whether agency abuses its discretion, court must ascertain whether agency "based its decision on legally irrelevant factors or failed to consider legally relevant factors.").

The Comptroller's interpretation, policy, and rule stating that insurers are not responsible for the full 100% of the tax because agents give insurers their share of the tax when they give an insurer 15% of the premium collected are reasonable and do not conflict with the plain meaning of either the retaliatory or premium tax stat-

utes. On the contrary, they specify exactly what section 8(b) of the premium tax statute requires: the insurer receiving "the premium tax due on the agent's portion" through the division of premium between agents and insurers. Accordingly, we overrule appellants' first two issues on appeal.

Comptroller's Application of Retaliatory Tax Statute is Constitutional

In addition to arguing that the Comptroller's new interpretation is incorrect, appellants also assert that the Comptroller's application of the retaliatory tax is unconstitutional because it violates the equal protection clause. Specifically, appellants insist that the retaliatory taxes imposed under the Comptroller's new interpretation unlawfully raise revenue for the state at the expense of foreign insurers, exceed the "relatively modest" amount of revenue raised under the California retaliatory tax scheme found constitutional in *Western and Southern Life Insurance*, and do not serve the purpose of promoting the interstate business of domestic insurers by deterring other states from enacting discriminatory taxes. *See Western & S. Life Ins. Co.*, 451 U.S. at 668-72, 101 S. Ct. 2070; *see also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985) (state may not impose "discriminatorily higher taxes on nonresident corporations solely because they are nonresidents."). Appellants urge the court to interpret Article 21.46 as requiring insurers to include 100% of the premium tax paid in the retaliatory tax calculation in order to avoid the alleged constitutional infirmities. *See Brady*, 795 S.W.2d at 715; Tex. Gov't Code Ann. § 311.021(1) (West 2005); *Ex parte Elliott*, 973 S.W.2d 737, 742 (Tex. App.–Austin 1998, pet. ref'd).

Alternatively, if the court determines that the Comptroller's interpretation is the only permissible interpretation, appellants contend the court should declare the

entire retaliatory tax statute unconstitutional because it imposes retaliatory taxes on foreign-title insurers that exceed the aggregate tax burden that would be imposed on a comparable Texas insurer doing business in the foreign state.[5]

The equal protection clause of the United States Constitution forbids states from denying to any person located within the jurisdiction of the states equal protection of the law. *See id.* at 656-57, 101 S. Ct. 2070. Similarly, the Texas Constitution also guarantees equal rights to all persons. Tex. Const. art. I, § 3. When determining whether a tax is unconstitutional, courts must look to the substance of the tax and not the form of the tax. *See Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 509-10, 47 S. Ct. 179, 71 L. Ed. 372 (1926) (court must regard substance not form for determining whether tax constitutional, and test is "in the operation and effect of the law as applied and enforced by the state" (quoting *St. Louis Southwestern Railway Co. v. State of Arkansas ex rel. Norwood*, 235 U.S. 350, 362, 35 S. Ct. 99, 59 L. Ed. 265 (1914))). Based on this premise, appellants insist that, regardless of whether the insurer or the agent is technically liable for the 85% of the premium tax, the Comptroller's interpretation imposes financial burdens on foreign insurers doing business in Texas that greatly exceed the financial burdens imposed on Texas insurers in the foreign state. Specifically, appellants contend that, because insurers will be allowed to include only 15% of the

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[5] Additionally, appellants insist that the Comptroller's interpretation would cause other states to retaliate against Texas-based insurers, which would be detrimental to both foreign and domestic insurers. However, it is not within the purview of this court to consider what other states may or may not do as a result of the Comptroller adopting this new interpretation. It is for the legislature, not the courts, to consider the possibility of other states' reactions when enacting legislation.

premium tax in the retaliatory tax calculation, foreign insurers will have to pay the difference between 15% of the premium tax imposed by Texas and the *total* premium tax the foreign state imposes, which would lead to foreign insurers paying significantly larger taxes than a comparable Texas insurer engaged in business in the foreign state.

However, we do not agree with the appellants' characterization of the Comptroller's interpretation. Because the Texas retaliatory statute applies only to foreign insurers, the equal taxation test applicable to retaliatory taxes requires a determination of whether the distinction between foreign and domestic insurers is rationally related to a legitimate government purpose. *Western & S. Life Ins. Co.*, 451 U.S. at 657, 101 S. Ct. 2070.[6] Generally speaking, retaliatory taxes are constitutional and raise minimum amounts of revenue. *Id.* at 669-70, 101 S. Ct. 2070. Retaliatory taxes are applied to foreign insurers for the purpose of deterring other states from imposing excessive taxes against domestic insurers, or alternatively, to compensate for higher out-of-state tax obligations imposed on Texas insurers, which serves a legitimate governmental purpose. *Id.* at 668-72, 101 S. Ct. 2070.

Under the Comptroller's interpretation of the retaliatory tax scheme, title agents remit 85% of the premium tax to title insurers. Appellants assert that by allowing foreign insurers to include only 15% of the premium tax in the retaliatory tax calculation, the Comptroller is imposing retaliatory taxes on foreign-title insurers that exceed the aggregate financial burden imposed on com-

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[6] Contrary to appellants' assertions, the test of the constitutionality of a retaliatory tax is not whether a retaliatory tax has increased or decreased over time, nor is the test whether the tax raises revenue. All taxes raise revenue, including the previous retaliatory tax statute.

parable Texas insurers doing business in the foreign state. The Comptroller's interpretation allows foreign insurers selling title insurance in Texas to include only the portion of the premium tax they actually pay in the retaliatory tax calculation. It compares a foreign title insurer's aggregate financial obligations in Texas to a Texas insurer's aggregate financial obligations in a foreign state; it then requires a retaliatory tax from a foreign-based insurer only if its Texas counterpart pays more in the foreign state, and requires, as payment in retaliatory taxes, the amount that would equalize the financial burdens on foreign insurers doing business in Texas and Texas insurers doing business in the foreign state. Accordingly, the Comptroller's interpretation serves the legitimate state purpose of deterring other states from imposing excessive taxes against Texas insurers. Therefore, both the retaliatory tax statute and the Comptroller's application of the retaliatory tax scheme are constitutional. *Compare Western & S. Life Ins. Co.*, 451 U.S. at 674, 101 S. Ct. 2070 (California retaliatory tax statute constitutional), with *Ward*, 470 U.S. at 878, 882, 105 S. Ct. 1676 (statute unconstitutional that gave domestic companies preferential treatment and burdened all foreign corporations regardless of what foreign states did).

Appellants further insist that because the Comptroller's current interpretation of article 9.59 has not been consistently and uniformly applied by the Comptroller, then the Comptroller's current interpretation is not entitled to judicial deference, and the Comptroller should be required to return to the previous interpretation. *See Texas Citrus Exch. v. Sharp*, 955 S.W.2d 164, 170 (Tex. App.–Austin 1997, no pet.) (courts do not defer to administrative construction that deviates from clear and express provisions of statutory scheme, and courts give greater deference to agency interpretation that is long-

standing and applied uniformly). However, just because the Comptroller uniformly enforced a statute until a certain date and then uniformly enforced the statute in a different manner does not mean there is a constitutional violation, especially where, as the Comptroller asserts, all the taxpayers have been treated equally since the new interpretation was adopted. *See generally Grocers Supply Co., Inc. v. Sharp*, 978 S.W.2d 638 (Tex. App.–Austin 1998, pet. denied). In the Comptroller's summary judgment evidence, she demonstrated that the new instructions have been consistently applied to audits conducted since 2000, which includes report years since 1996.

Further, taxpayers do not acquire a right to pay less in taxes because they have been charged lower taxes in the past or because a tax policy was incorrectly implemented. *See id.* (Comptroller changed previous interpretation of tax statute, and grocery store applied for refund of sales taxes previously paid; however, Comptroller changed interpretation of tax statute back to previous interpretation, and court held grocery store not entitled to refund). Past omissions by the Comptroller will not serve as a bar to the Comptroller enforcing the statute and from imposing the correct financial obligation on title insurers. *See Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 249 (Tex. 1991) (Comptroller did not enforce part of franchise tax statute for thirteen years, but supreme court held prior non-enforcement could not prevent Comptroller from properly collecting taxes due as required by statute).

Title insurers are financially obligated to pay 15% of the tax due on premiums. This requirement is mandated by the premium and retaliatory tax statutes and by the Comptroller's interpretation of these statutes. Requiring insurers to include only the 15% of the premium tax they actually pay does not render the retaliatory tax scheme unconstitutional. Because we conclude that the retalia-

tory tax statutory scheme and the Comptroller's application of it are constitutional, we overrule appellants' third issue on appeal.

CONCLUSION

The Comptroller's interpretation of the premium tax and retaliatory tax scheme is reasonable and does not contradict the plain meaning of either the retaliatory tax or the premium tax statutes. Further, the Comptroller's application of the two statutes is constitutional. Accordingly, the district court did not err in granting the Comptroller's motion for summary judgment and in denying appellants' motion for summary judgment. Therefore, we overrule appellants' three claims and affirm the judgment of the district court.

APPENDIX C

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
201st JUDICIAL DISTRICT

NO. GN 301692

FIRST AMERICAN TITLE INSURANCE COMPANY.
Plaintiff,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Defendants.

SUMMARY JUDGMENT

The Court, having heard Defendants' Motion for Summary Judgment, is of the opinion that it is meritorious and should be granted.

It is ORDERED that Defendants' Motion for Summary Judgment is granted with respect to all issues and claims. It is ORDERED that Plaintiff's Motion for Summary Judgment is denied with respect to all issues and claims.

Signed on May 17, 2004.

/s/
Judge Presiding

APPENDIX D

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
250th JUDICIAL DISTRICT

No. GN 301693

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Plaintiff,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Defendants.

SUMMARY JUDGMENT

The Court, having heard Defendants' Motion for Summary Judgment, is of the opinion that it is meritorious and should be granted.

It is ORDERED that Defendants' Motion for Summary Judgment is granted with respect to all issues and claims. It is ORDERED that Plaintiff's Motion for Summary Judgment is denied with respect to all issues and claims.

Signed on May 17, 2004.

/s/
Judge Presiding

APPENDIX E

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
201st JUDICIAL DISTRICT

CAUSE NO. GN 301692

FIRST AMERICAN TITLE INSURANCE COMPANY,
Plaintiff,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Defendants.

JUDGMENT NUNC PRO TUNC

The Court, having heard Defendants' Motion for Summary Judgment, is of the opinion that it is meritorious and should be granted.

It is ORDERED that Defendants' Motion for Summary Judgment is granted with respect to all issues and claims. It is ORDERED that Plaintiff's Motion for Summary Judgment is denied with respect to all issues and claims.

Signed on June 14, 2004.

/s/
Judge Presiding

APPENDIX F

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
250th JUDICIAL DISTRICT

CAUSE NO. GN 301693

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Plaintiff,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Defendants.

JUDGMENT NUNC PRO TUNC

The Court, having heard Defendants' Motion for Summary Judgment, is of the opinion that it is meritorious and should be granted.

It is ORDERED that Defendants' Motion for Summary Judgment is granted with respect to all issues and claims. It is ORDERED that Plaintiff's Motion for Summary Judgment is denied with respect to all issues and claims.

Signed on June 14, 2004.

/s/
Judge Presiding

APPENDIX G

THE SUPREME COURT OF TEXAS

Orders Pronounced August 29, 2008

ORDERS ON CAUSES

* * * * *

THE MOTIONS FOR REHEARING OF THE FOLLOWING CAUSES ARE DENIED:

05-0541 FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY v. SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF TEXAS; from Travis County; 3rd district (03-04-00342-CV, 169 SW3d 298, 06-03-05)

corrected opinion issued

* * * * *

APPENDIX H

RELEVANT STATUTORY PROVISIONS

1. Article 9.59 of the former Texas Insurance Code (2004) (current version at Tex. Ins. Code §§ 223.001-.011) provided as follows:

Title Insurance Companies; Tax on Premiums

Payment of Tax

Sec. 1. Each title insurance company receiving premiums from the business of title insurance shall pay to the comptroller a tax on those premiums as provided in this article.

Premium Defined

Sec. 2. In this article premium means the total amount of premiums received for the taxable year on title insurance written on property located in this state except premiums received from other licensed title insurance companies for reinsurance, less return premiums paid policyholders with no deduction for premiums paid for reinsurance.

Time of Filing and Payment

Sec. 3. (a) A premium tax return for each taxable year ending on December 31 of the preceding year shall be filed and the total amount of the tax due under this article shall be paid on or before March 1 of each year or another date prescribed by the comptroller.

(b) A semiannual prepayment of premium tax must be made on March 1 and August 1 by all insurers with net tax liability for the previous calendar year of more than $1,000. The tax paid on each date must equal one-half of the total premium tax paid for the previous calendar year. If no premium tax has been paid during the previous calendar year, the semiannual payment shall equal

the tax that would be owed on the aggregate of the gross premium receipts for the two previous calendar quarters at the minimum tax rate specified by law. The comptroller may refund any overpayment of premium taxes that results from the semiannual prepayment system established by this subsection.

(c) Without limiting the general authority of the comptroller to adopt rules to promote the efficient administration, collection, enforcement, and reporting of taxes under this code or another insurance law of this state, the commissioner or comptroller, as appropriate, may adopt rules, regulations, minimum standards, and limitations that are fair and reasonable as may be appropriate for the augmentation and implementation of this article.

Rate of Tax

Sec. 4. There is imposed on all premium on title insurance an annual tax equal to 1.35 percent.

Sec. 4A. Expired.

Annual Tax Return

Sec. 5. Each title insurance company that is liable under this article to remit tax on premium shall file a tax return annually on forms prescribed by the comptroller.

Sec. 6. Repealed by Acts 1993, 73rd Leg., ch. 685, § 3.29(5), eff. Sept. 1, 1993.

Examination and Evaluation Fee Credits

Sec. 7. The amount of all examination and evaluation fees paid in each taxable year to the State of Texas by a title insurance company shall be allowed as a credit on the amount of premium taxes due under this article. The limitations provided by Sections 803.007(1) and (2)(B) of this code for domestic insurance companies apply to foreign insurance companies. Any credit allowed by this section is in addition to any other credits allowed by law.

No Other Taxes to be Levied or Collected; Exceptions

Sec. 8. (a) Title insurance companies and title insurance agents subject to the tax levied by this article may not be required to pay any additional tax in proportion to their gross premium receipts levied by this state or any county or municipality except as otherwise provided by this code and the Labor Code. This exemption may not be construed to limit the applicability of other taxes, fees, and assessments that are imposed by other chapters of this code. This exemption may not be construed to prohibit the levy and collection of state, county, and municipal taxes on the real and personal property of title insurance companies and title insurance agents, or the levy and collection of state, county, and municipal taxes that are imposed by other laws of this state, unless a specific exemption for title insurance companies and title insurance agents is provided in those laws.

(b) The premium tax is levied on all amounts defined to be premium in this Chapter, whether paid to the title insurance company or retained by the title insurance agent, such tax being in lieu of the tax on the premium retained by the agent. The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.

Failure to Pay Taxes

Sec. 9. A title insurance company failing to pay all taxes imposed by this article is also subject to Article 4.05 of this code.

Sec. 10. Repealed by Acts 1993, 73rd Leg., ch. 685, § 3.29(5), eff. Sept. 1, 1993.

Secs. 11, 12. Repealed by Acts 1989, 71st Leg., ch. 232, § 25(b)(5) and (b)(6), eff. Sept. 1, 1989.

Secs. 13, 14. Repealed by Acts 1999, 76th Leg., ch. 852, § 5(2), eff. June 18, 1999.

Other Laws to Govern

Sec. 15. Article 4.12 applies to title insurance companies which are subject to this article.

Sec. 16. Repealed by Acts 2003, 78th Leg., ch. 209, § 59(3).

* * * * *

2. Article 21.46 of the former Texas Insurance Code (2004) (current version at Tex. Ins. Code §§ 281.001-.008) provided as follows:

Retaliatory Provisions; Payment of Taxes, Fines, Penalties, Etc.; Condition Precedent to Doing Business in State; Exemptions

Retaliatory Tax

Sec. 1. (a) Whenever by the laws of any other state or territory of the United States any taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company that is organized in this State and licensed and is doing business or that may do business in such other state or territory which, in the aggregate are in excess of the aggregate of the taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon a similar insurance company of such other state or territory doing business in this State, the comptroller shall impose upon and collect from any similar company of such state or territory in the same manner and for the same purpose, the same taxes, licenses, fees, fines, penalties, deposit re-

quirements or other obligations, prohibitions or restrictions; provided, however, the aggregate of taxes, licenses, fees, fines, penalties or other obligations imposed by this State pursuant to this Article on an insurance company of another state or territory shall not exceed the aggregate of such charges imposed by such other state or territory on a similar insurance company of this State that may be licensed and doing business.

(b) Whenever under the law of any state or territory the rate of taxation is reduced or a tax credit is granted to any such company making investments in the state or territory, having maintained offices in the state or territory, or meeting some other similar requirements of the state or territory, those laws shall be applied in the same manner in this state in the determination of the aggregate obligations under this Article.

(b-1) Expired.

(c) For the purpose of this Section, an alien insurer shall be deemed a company of the State designated by it wherein it:

(1) has established its principal office or agency in the United States;

(2) maintains the largest amount of its assets held in trust or on deposit for the security of its policyholders or policyholders and creditors in the United States; or

(3) was admitted to do business in the United States.

(d) The tax collected by the comptroller under this Article shall be deposited in the State Treasury to the credit of the general revenue fund. The comptroller shall prescribe the due date for the filing of the report and payment of the tax under this Article. The comptroller may adopt rules concerning the administration and collection of taxes under this Article.

(e) The provisions of this Section shall not apply to ad valorem taxes on real or personal property, personal income taxes, sales taxes, or to surcharges that insurers may recoup directly from policyholders.

(f) The provisions of this Act shall not apply to a company of any other state doing business in this State if fifteen per cent (15%) or more of the voting stock of said company is owned by a corporation organized under the laws of this State, and domiciled in this State; however, the prior provisions of this Act shall apply without exception to any and all person or persons, company or companies, firm or firms, association or associations, group or groups, corporation or corporations, or any insurance organization or organizations of any kind, which did not qualify as a matter of fact, under the exception of this paragraph, on or before January 29, 1957.

(g) The provisions of this Section shall not apply to special purpose assessments, such as guaranty association assessments, high risk health pool assessments, joint underwriting association (JUA) assessments, windstorm association assessments, or other similar assessments, both under the laws of this State and under the laws of any other state or territory. Any tax offset or credit related to such assessments that is offset or credited in computing aggregate taxes under this Section for this State and any other state or territory, shall, for purposes of this Section, be treated as a tax paid both under the laws of this State and under the laws of any other state or territory.

Other Retaliatory Provisions

Sec. 2. Should the insurance department, commissioner, director, or other similar insurance regulatory official of any other state or territory of the United States impose any sanctions, fines, penalties, financial or deposit requirements, prohibitions, restrictions, regulatory re-

quirements, or other obligations of any kind upon any insurance company organized or chartered in this state and licensed to transact business in such other state or territory, because of the failure of the Texas Department of Insurance to obtain, maintain, or receive accreditation certification or any similar form of approval, compliance, or acceptance from, by, or as a member of the National Association of Insurance Commissioners, or any committee, task force, working group, or advisory committee thereof, or because of the failure of the Texas Department of Insurance to comply with any directive, financial annual statement requirement, model act or regulation, market conduct or financial examination report or requirement, or any report of any kind of the National Association of Insurance Commissioners, or any committee, task force, working group, or advisory committee thereof, the Texas Department of Insurance shall, without exception or exclusion, impose upon any and all insurance companies organized or chartered in such other state or territory and licensed to do business in this state the same sanctions, fines, penalties, deposit requirements, prohibitions, restrictions, or other obligations imposed upon the insurance company of this state.

APPENDIX I

STATE RETALIATORY TAX STATUTES

Ala. Code § 27-3-29
Alaska Stat. § 21.09.270
Ariz. Rev. Stat. § 20-230
Ark. Code § 23-63-102
Cal. Ins. Code § 685(a)
Colo. Rev. Stat. § 10-3-209(2)
Conn. Gen. Stat. § 12-211
18 Del. Code § 532
D.C. Code § 31-205(f)
Fla. Stat. § 624.5091
Ga. Code § 33-3-26
Idaho Code § 41-340
215 Ill. Comp. Stat. 5/444
Ind. Code § 27-1-20-12
Iowa Code § 505.14
Kan. Stat. § 40-253
Ky. Rev. Stat. § 304.3-270
La. Rev. Stat. § 22:1079
24-A Me. Rev. Stat. § 428
Md. Code Ins. § 6-303
Mass. Gen. Laws ch. 63 §§ 21, 23
Mich. Comp. Laws § 500.476a
Minn. Stat. § 297I.05(11)
Miss. Code § 27-15-123
Mo. Stat. § 375.916
Mont. Code § 33-2-709
Neb. Rev. Stat. § 44-150
Nev. Rev. Stat. § 680A.330
N.H. Rev. Stat. § 400-A:35

N.J. Stat. § 17B:23-5
N.M. Stat. § 59A-5-33
N.Y. Ins. Law § 1112
N.C. Gen. Stat. § 58-16-25
N.D. Cent. Code § 26.1-11-06
Ohio Rev. Code § 5729.06
36 Okla. Stat. § 628
Or. Rev. Stat. § 731.854
40 Pa. Stat. § 50
R.I. Gen. Laws § 27-2-17
S.C. Code § 38-7-90
S.D. Codified Laws § 58-6-70
Tenn. Code § 56-4-218
Tex. Ins. Code § 281.004
Utah Code § 31A-3-401
8 Vt. Stat. § 3367
Va. Code § 38.2-1026
Wash. Rev. Code § 48.14.040
W. Va. Code § 33-3-16
Wis. Stat. § 76.66
Wyo. Stat. § 26-3-130

Hawaii has no retaliatory tax statute.

APPENDIX J

STATE PREMIUM TAX STATUTES

Ala. Code § 27-4A-3(a)(3)
Alaska Stat. § 21.66.110(a)
Ariz. Rev. Stat. §§ 20-224(D), 1566(A) (income tax)
Ark. Code § 26-57-603(d)
Cal. Rev. & Tax. Code §§ 12201, 12231
Colo. Rev. Stat. § 10-3-209
Conn. Gen. Stat. §§ 12-202, -210
18 Del. Code § 702(c)(1)
D.C. Code § 31-205(b)
Fla. Stat. § 624.509(1)
Ga. Code § 33-8-4(a)
Haw. Rev. Stat. § 431:7-202(d)
Idaho Code § 41-402(1)(b), (2)(a)
215 Ill. Comp. Stat. 5/409
Ind. Code § 27-1-18-2(a)
Kan. Stat. § 40-252
Ky. Rev. Stat. § 136.340(1)
La. Rev. Stat. § 47:224(A)
36 Me. Rev. Stat. § 2513
Md. Code Ins. § 6-102(b)(5)
Mass. Gen. Laws ch. 63 § 22
Mich. Comp. Laws § 208.1235
Minn. Stat. § 297I.05(1)
Miss. Code §§ 27-15-103(1), -109(1)
Mo. Stat. § 148.320
Mont. Code § 33-2-705(2)
Neb. Rev. Stat. § 77-908
Nev. Rev. Stat. § 680B.027(1)
N.H. Rev. Stat. § 400-A:32(I)

N.J. Stat. 54:18A-1
N.M. Stat. § 59A-6-2(B)
N.Y. Tax Law § 1502-a
N.C. Gen. Stat. § 105-228.5
N.D. Cent. Code § 26.1-03-17(1)
Ohio Rev. Code § 5729.03
36 Okla. Stat. § 624(A)(2)
Or. Rev. Stat. § 317.655
72 Pa. Stat. § 7902(a)
R.I. Gen. Laws § 44-17-1
S.C. Code § 38-7-20
S.D. Codified Laws § 10-44-2
Tenn. Code § 56-35-107
Tex. Ins. Code § 223.003
Utah Code § 59-9-101(3)
32 Vt. Stat. § 8551
Va. Code § 58.1-2501(1)
Wash. Rev. Code § 48.29.150 (income tax)
W. Va. Code § 33-3-14(a)
Wis. Stat. § 76.63(1)
Wyo. Stat. § 26-4-103(2)

Iowa Code § 515.48(10) prohibits title insurance.